TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 821. 88.

THE CLEVELAND TRUST COMPANY, PLAINTIFF IN ERROR,

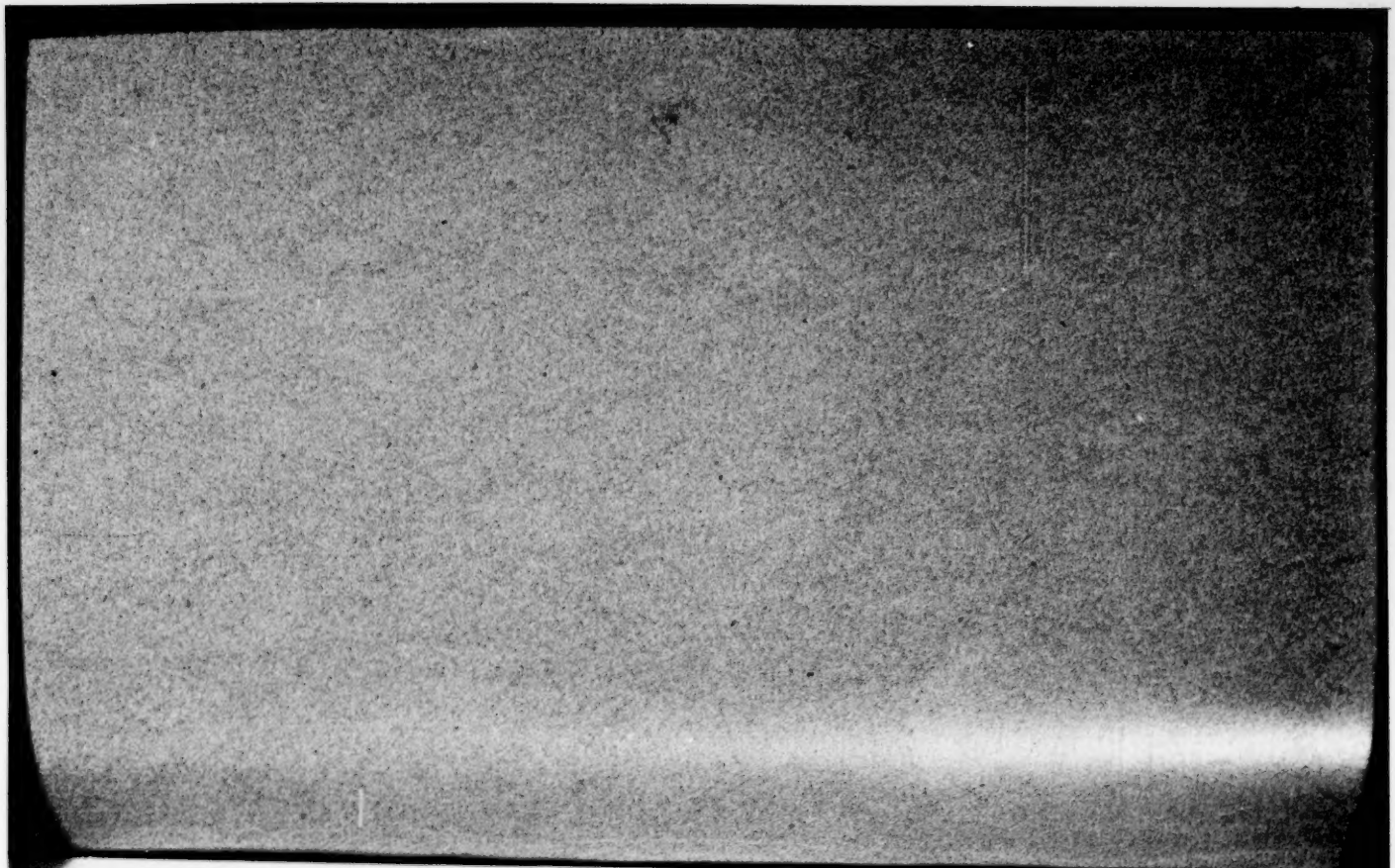
vs.

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 20, 1900.

(17,806.)



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THE CLEVELAND TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 In the Supreme Court of Ohio.

THE CLEVELAND TRUST CO., Plaintiff in Error,
vs.
M. A. LANDER, as Treasurer, Defendant in Error. } No. 6972.

Error to circuit court of Cuyahoga county.

Record.

Garfield, Garfield & Howe, attorneys for plaintiff in error.
P. H. Kaiser and F. L. Taft, attorneys for defendant in error.

Filed Feb. 15, 1900, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

2 In the Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY, Plaintiff in Error,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant in Error.

Petition in Error.

The plaintiff in error says that at the January term, 1899, of the court of common pleas of Cuyahoga county, defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff, and defendant in error was defendant; thereafter in the January term, 1900, of the circuit court of Cuyahoga county, said judgment of the common pleas court was affirmed by the circuit court of said county in proceedings in error; a duly certified transcript of the docket and journal entries and record, together with the original papers and pleadings of the case are filed herewith.

There is error in the said record and proceedings in this respect, to wit:

I. Said common pleas court erred in sustaining the demurrer of the defendant in error to the petition of plaintiff in error, and said circuit court erred in affirming said judgment.

II. Said common pleas court erred in rendering judgment for said defendant in error when it should have been given for said plaintiff in error and said circuit court erred in affirming the same.

3 The plaintiff in error therefore prays that said judgment may be reversed and that it be restored to all things it has lost by reason thereof.

GARFIELD, GARFIELD & HOWE,
Attorneys for The Cleveland Trust Co., Plaintiff in Error.

Waiver of Process.

Waiving the issuance and service of summons in error, we hereby enter the appearance of the defendant in error, M. A. Lander, treasurer of Cuyahoga county, this 1st day of February, 1900.

P. H. KAISER AND
F. L. TAFT,
Att'ys for Def't in Error.

4 THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Court of Common Pleas.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant.

Petition.

The plaintiff says that it is a corporation duly organized under the laws of the State of Ohio, and was incorporated for the purpose of and is now engaged in doing a banking business in the city of Cleveland in said State; that the defendant is treasurer of Cuyahoga county, having in his possession the duplicate containing the list of taxes for the year 1898, including all taxes assessed against the plaintiff.

The plaintiff further represents and avers that it has a capital stock of five hundred thousand dollars ($500,000) divided into five thousand (5,000) shares of one hundred dollars ($100) each, all of which is paid up, and for which certificates are outstanding and owned by a large number of persons, most of whom reside in the State of Ohio; that in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the treasurer of the plaintiff duly reported in duplicate to the auditor of said county of Cuyahoga, the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday of May, 1898, together with a full statement of the names and residences of the stockholders therein, and with the number of shares held by each and the par value thereof as required by said
5 statute; that included in said return so made by said treasurer was the real estate owned by the plaintiff, returned at $25,000.00, which is separately assessed and charged on the tax duplicate of said county, and the tax thereon paid to the treasurer of said county, the defendant, aside from the taxes set forth in this petition; that said return also included one hundred and seventy-four (174) bonds of the United States of the denomination of one thousand dollars ($1,000) each, then and for a long time prior thereto owned by the plaintiff and in which the plaintiff had invested part of its capital stock; that said bonds of the United States are and were at the time of the making of said return non-taxable

under and by virtue of section 3701 of the Revised Statutes of the United States; that the value placed upon said bonds by the treasurer of the plaintiff was $213,274.84, and the same was deducted from the $500,000 par value of paid-in capital stock included in said return among the liabilities of the plaintiff, leaving a balance as shown by said returns of $286,725.19.

The plaintiff further says that said county auditor thereupon proceeded as required by sec. 2766 of the Revised Statutes of Ohio to fix and did fix the total value of the shares of the capital stock of the plaintiff at $338,700, exclusive of the assessed value of its real estate; that said auditor in fixing the value of such shares did, without lawful authority, include said U. S. Government bonds, valuing the same at $213,274.84—that is to say, said auditor refused to allow the deduction of said amount last named from the $500,000 par value of paid-in capital stock of the plaintiff as shown upon its return for 1898; that no notice of such addition and the consequent enhanced valuation placed upon the total shares of plaintiff's capital stock was, until the 11th day of November, 1898, given to the plaintiff or to any of its stockholders, nor did the plaintiff or any of its stockholders know that said U. S. Government bonds had been included in fixing such valuation of shares until said 10th day of November, 1898; that it is the regular custom of banks and banking associations throughout the State of Ohio to deduct the value of Government bonds owned by them from the paid-in capital stock returned,
6 although not so apparent upon the face of their returns to the several county auditors; that said bonds were by the banks and banking associations of this State so deducted in the return for 1897; that similar deductions of U. S. Government bonds are likewise made by unincorporated banks in the State of Ohio under and by virtue of R. S. of State of Ohio, sec. 2759; that the auditor of Cuyahoga county and the county auditors elsewhere throughout the State, as this plaintiff is informed and believes, did not include U. S. Government bonds so owned in fixing the total value for 1898 of the shares of the several incorporated banks of Ohio as directed by section 2766 of the Revised Statutes of Ohio.

That the auditor of Cuyahoga county thereafter entered said valuation upon the tax duplicate of said county for the year 1898, and did assess taxes against the same at the rate of .02955 cents on each dollar's valuation, which was the rate of taxation for the taxes assessed for the year 1898 within said county, city and sewer district, and which on said valuation of shares amounted to $10,510.94.

The plaintiff further avers that by section 1042 of the Revised Statutes of Ohio, it is made the duty of the auditor of Cuyahoga county, on November 1st of each year, to deliver to the county treasurer a true copy or duplicate of the books containing the tax-list required to be made by him for the year.

Wherefore the plaintiff submits that said auditor of Cuyahoga county had no authority or power to include said U. S. Government bonds at a valuation of $213,274.84 or any other sum in fixing the valuation of the shares of this plaintiff; and that his action in respect thereof was totally void and of no effect.

10 THE STATE OF OHIO, } ss.
Cuyahoga County, }

In the Court of Common Pleas.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant.

Demurrer.

Now comes the defendant and demurs to the petition for the reason that the same does not set forth facts sufficient to constitute a cause of action.

Brief.

No deduction other than the duplicate value of the real estate owned by the bank, is required by sec. 2766.

Oral argument is requested.

P. H. KAISER AND
F. L. TAFT,
Attorneys for Defendant.

11 THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Court of Common Pleas.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant.

Motion for New Trial.

The plaintiff moves for a new trial for the following reason, to wit:

That the court erred in sustaining the demurrer of the defendant to the petition of the plaintiff.

GARFIELD, GARFIELD & HOWE,
Attorneys for Plaintiff.

12 THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Circuit Court.

THE CLEVELAND TRUST COMPANY, Plaintiff in Error,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant in Error.

Petition in Error.

The plaintiff in error says that at the January term, 1899, of the court of common pleas of Cuyahoga county, the defendant in error recovered a judgment by consideration of said court against the

plaintiff in error in an action then pending in said court, wherein the plaintiff in error was plaintiff, and the defendant in error was defendant.

A transcript of the docket and journal entries whereof and the original papers and pleadings are filed herewith.

There is error in said record and proceedings prejudicial to the plaintiff in error in this, to wit:

1. Said court erred in sustaining the demurrer of the defendant to the petition of the plaintiff.
2. Said court erred in rendering judgment against the plaintiff for costs.
3. Said court erred in overruling the motion for a new trial.
4. Said judgment was contrary to law, as well as the statutes and Constitution of the United States.

13 Wherefore the plaintiff in error prays that said judgment of the court of common pleas be reversed and that the plaintiff in error be restored to all things lost by reason thereof.

GARFIELD, GARFIELD & HOWE,
Attorneys for Plaintiff in Error.

Waiver of Process.

The defendant in error waives the issuance and service of summons in error and enters its appearance herein.

April 4, 1899.

P. H. KAISER AND
F. L. TAFT,
Attorneys for Defendant in Error.

14 *Docket and Journal Entries.*

THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Court of Common Pleas.

THE CLEVELAND TRUST COMPANY, Plaintiff, vs. M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant. } C. C. No., 2363: C. P. No., 65722.

Injunction and relief.

1899, January term, begun and held January 19th, 1899.

January 19th.—Petition and precipe filed and
To court: A restraining order is allowed in this cause, as prayed for in the petition, on plaintiff giving bond in $8,000.00, to continue until further order of the court. Jour. 134, page 31. Whereupon undertaking in $8,000.00 with H. A. Garfield as surety filed and summons with notice of restraining order issued.

January 25th, 1899.—Undertaking for restraining order in $8,000.00 with American Surety Co., as surety filed.

January 31st, 1899.—Demurrer by defendant to petition with brief filed.

March 1st, 1899.—To court: The demurrer to the petition is heard and sustained at the plaintiff's costs, for which judgment is rendered against it. To which ruling plaintiff excepts. Jour. 134, page 229.

March 3rd, 1899.—Motion by plaintiff for a new trial filed.

15 March 28th, 1899.—To court: The motion by plaintiff for a new trial is heard and refused, and the plaintiff not desiring to plead further, it is now considered that said defendant go hence without day and recover of said plaintiff his costs herein and judgment is rendered against the plaintiff for its costs herein. Jour. 134, page 382.

April 5th, 1899.—Petition in error filed in circuit court by plaintiff.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

I, Harry L. Vail, clerk of the court of common pleas, in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court, in the above-entitled cause.

And I also certify that the enclosed are the original papers and pleadings filed in said cause, in the said court of common pleas.

Attest, my hand and the seal of said court, at Cleveland, this 5th day of April, 1899.

[SEAL.] HARRY L. VAIL, *Clerk,*
By W. R. COATES,
Deputy Clerk.

16 *Docket and Journal Entries.*

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

In the Circuit Court.

THE CLEVELAND TRUST COMPANY, Plaintiff in Error,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant in Error.

C. C. No., 2363;
C. P. No., 65722.

Error to common pleas.

January Term, 1900.

April 5.—Petition in error, waiver of process, transcript and original papers from common pleas filed.

Jan. 22, 1900.—To court: This cause came on to be heard upon the petition in error, original papers and pleadings, and the transcript of the record in the court of common pleas, and was argued

y counsel, and on consideration of all the assigned errors, the judg-ent of the said court of common pleas is affirmed, there being, owever, in the opinion of the court, reasonable ground for this pro-eding in error.

It is therefore considered that said defendant in error recover of id plaintiff in error his costs herein. Ordered that a special man-ate be sent to the court of common pleas to carry this judgment to execution. To which ruling and judgment the plaintiff in ror excepts. Journal 7, 219.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

I, Harry L. Vail, clerk of the circuit court in and for said county, o hereby certify that the above is a true transcript of the docket d journal entries of said court in the above-entitled cause, The leveland Trust Company *vs.* M. A. Lander, as treasurer.

I also certify that the enclosed are the original papers and plead-gs filed in said cause in said circuit court.

Witness my hand and seal of said court, at Cleveland, this 29th y of January, 1900.

HARRY L. VAIL, *Clerk,*
By W. R. COATES,
Deputy Clerk.

STATE OF OHIO, }
City of Columbus, }

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, reby certify that the printed record hereto attached is a true copy the printed record filed in cause No. 6972, The Cleveland Trust mpany against M. A. Lander, treasurer, and used by this court in e consideration of said cause.

In witness whereof I have hereunto subscribed my name and fixed the seal of said court this seventh day of May, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

19 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, } ss.:
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1900.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

THE CLEVELAND TRUST COMPANY, Plaintiff in Error,
vs.
M. A. LANDER, Treasurer of Cuyahoga County, Ohio, Defendant in Error.
} #6972. Error to the Circuit Court of Cuyahoga County.

Feb'y 15, 1900. Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" " " Printed record and proof of service filed.
" " " Motion by plaintiff to advance, notice, and consent filed.
" 20, " Journal entry:
"Motion by plaintiff to advance cause No. 6972 on the general docket."
"Ordered by the court that said motion be, and the same is hereby, sustained. Cause set for hearing on oral argument March 8th, 1900." O. B. No. 17, p. 82.
" 24, " Receipted bill for printing record filed.
Mar. 3, " Plaintiff's printed brief filed.
" 8, " Defendant's printed brief and proof of service filed.
" 20, " Journal entry:
"This cause came on to be heard upon the transcript of the record of the circuit court of Cuyahoga county and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and
20 the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.
It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.
Ordered that a special mandate be sent to the court of common pleas of Cuyahoga county to carry this judgment into execution.
Ordered that a copy of this entry be certified to the clerk of the circuit court of Cuyahoga county 'for entry.'" O. B. No. 17, p. 120.

Mar. 27, 1900. Mandate issued.
May 15, " Journal entry:

"This cause came on to be heard in the supreme court of Ohio, which court is the highest court of record in said State, upon the transcript of the record of the circuit court of Cuyahoga county and was argued by counsel, and on consideration whereof it was ordered, adjudged, and decreed by this court that the judgment of the said circuit court of Cuyahoga county be, and the same is hereby, affirmed; and it is hereby certified that in rendering judgment in this cause it was necessary to construe section 3701 of the Revised Statutes of the United States, and, upon the record and the briefs and oral argument of counsel for The Cleveland Trust Company, the plaintiff in error, it was claimed and relied upon that, under said section 3701, the said The Cleveland Trust Company was entitled to deduct for the purposes of taxation the amount of its holdings in bonds of the United States of America, and this court in this judgment decided and held against the construction of the said section as so claimed by counsel for the plaintiff in error upon the ground and for the reasons stated in the opinion of the report of this case.

And it is further ordered that the said plaintiff in error pay the costs made in this court and in the circuit court and in the court of common pleas, and in default that execution issue therefor; and this cause is remanded to the court of common pleas of Cuyahoga county for execution." O. B. No. 17, p. 189.

May 22, 1900. Supersedeas bond filed.

21 Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY)
vs.
M. A. LANDER, Treasurer of Cuyahoga County, Ohio.)

STATE OF OHIO,)
City of Columbus,) ss:

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the decision in this case was handed down by the court on March 20th, 1900, and, upon application of counsel for plaintiff in error to have the entry of the judgment show that a constitutional question was raised, the court ordered the certificate above set forth, showing that fact, to be entered May 15th, 1900, and that the foregoing transcript of the docket and journal entries in cause The Cleveland Trust Company *vs.* M. A. Lander, treasurer of Cuyahoga

county, Ohio, is truly taken and correctly copied from the records of said court, to wit, Minute Book No. 20, page 569, and Order Book No. 17, pages 82, 120, and 189.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this fifth day of June, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By JOHN P. DANA, *Deputy*.

22 [Endorsed:] Supreme court of Ohio. The Cleveland Trust Co. *vs.* M. A. Lander, treasurer, etc. Certified transcript of docket and journal entries.

23 Supreme Court of Ohio.

THE CLEVELAND TRUST CO.
v.
LANDER, Treasurer.

Taxation of national bank shares—Restriction of section 5219, U. S. Revised Statutes—Right of State to tax shares—Sections 2672, 2765, 2766 and 2769, Revised Statutes—Sections 3701 and 5219, U. S. Revised Statutes—Limitation of section 3 of article 12 and section 4 of article 13 of constitution—Prohibition of double taxation of bank property:

1. The restriction in section 5219, Revised Statutes of the United States, as to the taxation of national bank shares at a rate not greater than on other moneyed capital, requires that both the rate per centum of taxation and the value of the assessment against such shares, shall not be greater than on other moneyed capital in the hands of individual citizens of the State.
2. The right granted to a State to tax shares of national banks, cannot be exercised by a State, unless it imposes upon the moneyed capital in the hands of individual citizens of the State, a tax at least equal in amount upon the same valuation, as is imposed upon national bank shares.
3. Section 2762, Revised Statutes, in requiring the shares of incorporated banks to be listed for taxation at their true value in money, is not in conflict with section 3701, Revised Statutes of the United States.
4. Sections 2764, 2765, 2766 and 2769, Revised Statutes, provide a method for fixing the value of the shares of a bank for taxation. The shares are taxed, and not the property of the bank except its real estate.
5. There is nothing in the constitution of this State to prevent the General Assembly from conforming our tax laws to the restrictions contained in section 5219, Revised Statutes of the United States, as that section has been construed by the Supreme Court.

6. The amount of the property of an incorporated State bank, less its non-taxable bonds, is not usually the equivalent of the amount of all its shares. If both are the same in amount, the General Assembly, in conforming to the restrictions in section 5219, Revised Statutes of the United States, may impose the tax, either upon the property, or upon the shares; but if they differ materially in amount, the tax must be upon the shares.
7. The limitations in section 3 of article 12, and section 4 of article 13 of the constitution, prohibit double taxation of the property of banks, bankers and corporations.

(Decided March 20, 1900.)

Error to the circuit court of Cuyahoga county.

The Cleveland Trust Company, plaintiff below, and also plaintiff in error here, is a corporation organized and incorporated under the statutes of this State, and is engaged in the banking business at the city of Cleveland. It has a paid-up capital stock of $500,000 divided into shares of one hundred dollars each. It owns and holds 174 bonds of the United States, each of the denomination of one thousand dollars. In making its return for taxation in May, 1898, to the county auditor, it deducted the value of said bonds from its capital stock and returned the balance, less the duplicate value of its real estate, to the county auditor for taxation. The county auditor added the amount of the value of the bonds to the return, and upon the basis of the amount of the return so increased by said addition, fixed the value of each share of its capital stock, and entered such shares upon the duplicate for taxation against the holders of such shares, and delivered the duplicate to the county treasurer, who proceeded to collect the taxes so assessed. Thereupon the trust com-
24 pany began its action against the treasurer, seeking to enjoin so much of the taxes as were levied by reason of the valuation placed upon said bonds and so added to said return, and tendered payment of the taxes levied upon its return as originally made by it. The ground upon which the injunction was asked is, that the United States bonds are non-taxable under section 3701, Revised Statutes of the United States, and "that it is the regular custom of banks and banking associations throughout the State of Ohio to deduct the value of Government bonds owned by them from the paid-in capital stock returned, although not so apparent upon the face of their returns to the several county auditors; that said bonds were by the banks and banking associations of this State so deducted in the returns for 1897; that similar deductions of United States Government bonds are likewise made by unincorporated banks in the State of Ohio under and by virtue of Revised Statutes of the State of Ohio, section 2759; that the auditor of Cuyahoga county, and the county auditors elsewhere throughout the State, as this plaintiff is informed and believes, did not include United States Government bonds so owned in fixing the total value for 1898 of the shares of the several incorporated banks of Ohio, as directed by section 2766 of the Revised Statutes of Ohio."

To this petition the county treasurer by his counsel demurred upon the ground that it did not state facts sufficient to constitute a cause of action.

The common pleas sustained the demurrer, and the plaintiff not desiring to plead further, the court rendered final judgment dismissing the petition. The circuit court affirmed the judgment. Thereupon the trust company filed its petition in this court, seeking to reverse the judgments below.

Garfield, Garfield & Howe, for plaintiff in error.
P. H. Kaiser and F. L. Taft, for defendant in error.

BURKET, *J.*:

The petition is in due and proper form, so that the demurrer is upon the merits of the cause, and not upon the form of the petition.

The taxation of banks and banking associations is regulated in this State by statute, and therefore the custom of banks and banking associations can avail nothing against such public statutes; neither can the acts or official course of procedure of county auditors make lawful that which is in conflict with such statutes. Custom cannot prevail over a statute. If the county auditors have been derelict in their duties, as to the taxation of banks, bankers, banking associations or the stock or shares of such corporations, the proper remedy is, not to still further transgress the law by remitting still other taxes in a vain effort to secure equality, but by bringing all up to the standard of the statute, and thereby securing equality of taxation as near as may be. Wagoner *v.* Loomis, 37 Ohio St., 571.

The demurrer was therefore properly sustained to the petition in so far as it founds its cause for relief upon the custom of banks, bankers and banking associations, and the acts and course of proceeding of county auditors in conflict with the statutes of the State.

We will next consider the petition as founded upon the ground that the Government bonds are non-taxable, under section 3701, Revised Statutes of the United States. This section is *in pari materia* with section 5219, and both must be read together. They are as follows:

"SECTION 3701. All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not else-

where. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Section 5219 was passed long after 3701, and has a modifying influence on the latter. Before the passage of 5219 it was held by the Supreme Court of the United States in Bank Tax cases, 2 Wallace, 200, that United States bonds owned and held by a bank must be deducted from the amount of its capital in making its returns for taxation; but afterward it was held by the same court that the value of the bank shares might be fixed upon the whole capital stock including the bank's investments in Government bonds. Van Allen *v.* The Assessors, 3 Wallace, 573, and many subsequent cases.

So that the holding now is that shares in national banks, and in incorporated State banks, may be taxed at their true value in money including in such value all Government bonds owned and held by such bank. People *v.* The Commissioners, 4 Wallace, 244; Bradley *v.* The People, 4 Wallace, 459; Frazer *v.* Siebern, 16 Ohio St., 614; section 2762, Revised Statutes of Ohio.

In every respect, except the issuing of bills to circulate as money, State banks carry on a similar business, and operations and investments of a like character as national banks, and it is therefore proper to compare the investments of capital in such banks with capital invested in national bank shares. That capital invested in State banks which do not issue bills, is moneyed capital in the hands of individual citizens as that term is used in said section 5219 is shown in the case of Mercantile Bank *v.* New York, 121 U. S., 138, where the court in speaking of such banks and the change in said section as amended in 1868, say: "Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands." And being so included, that is, being capital which comes directly in competition with capital invested in national bank shares, it follows that the taxation on national bank shares cannot be greater than upon capital invested in State banks, whether the taxation on State banks be upon their shares or upon their taxable capital. In that case the court say: "A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their values as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of State laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of a like character." See also First National Bank of Garnett *v.* Ayers, 160 U. S., 660.

It is urged that section 5219 provides only that the rate, that is, the per centum, on the fixed valuation, shall not be higher on national bank shares than on other moneyed capital, and the language

used in Van Allen *v.* The Assessors, 3 Wallace, 573; People *v.* Commissioners, 4 Wallace, 244, and the holding of this court in Frazer *v.* Siebern, 16 Ohio St., 614, would seem to support this view; but when we turn to the later cases of People *v.* Weaver, 100 U. S., 539; Cummings *v.* National Bank, 101 U. S., 153; Supervisors *v.* Stanley, 105 U. S., 305; Boyer *v.* Boyer, 113 U. S., 689, and Williams *v.* Supervisors, 122 U. S., 154, we find that it is not only the
26 rate per centum, but also the valuation, so that having the rate and valuation of national bank shares, the same as other moneyed capital, the taxation will be the same, which is the aim and purpose of said section 5219. If the same rate should be preserved and a much higher valuation of such shares allowed, the tax to be paid on such shares would be higher than on other moneyed capital, and that would violate the intention of the section in question. Section 5219 was materially changed by the amendment of February 10, 1868, whereby the provision as to the tax on shares of State banks was omitted, and the restriction that the taxation on national bank shares shall not be at a greater rate than on other moneyed capital, was inserted. As the section now stands it is the taxation, and not merely the per cent., that cannot be at a greater rate than on other moneyed capital. To make the taxation the same as on other moneyed capital, it is necessary that both the rate and valuation should be the same. And this rule as to the rate and valuation prevails in this State. In Exchange Bank *v.* Hines, 3 Ohio St., 1, we find the following on page 15: "Taxing by a uniform rule requires uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." The restriction therefore in said section 5219, to the effect that taxation on national bank shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," means that both the rate per centum and the valuation on national bank shares shall not be greater than on other moneyed capital. From this it follows that if the Government bonds held by a national bank are included in its return for taxation, from which the value of its shares is determined, the same must be done in the returns of incorporated State banks. To allow incorporated State banks to deduct their Government bonds from their returns for taxation, and deny that right to national banks, would be to compel the latter to pay greater taxation on the same investment than the former. To prevent such a result was the object of said section 5219. It therefore follows that in order to retain the right to tax national bank shares without deducting the bonds held by the bank from its return, we must in like manner tax the shares of incorporated State banks, or else impose a tax of equal amount upon the property of State banks. The case of Van Slyke *v.* The State, 23 Wis., 655, affirmed in 154 U. S., 581, does not conflict with this conclusion. In that case the tax upon the property of the bank was the full equivalent of a tax upon its shares, and that being so, it could make no difference whether the tax was

called a tax on shares, or on the capital, so long as the amount was in the proper sum, and no injustice was done to any one. The case was affirmed by the Supreme Court of the United States upon the authority of National Bank *v.* Commonwealth, 9 Wallace, 353; Lionberger *v.* Rouse, 9 Wallace, 468, which cases clearly recognize the rule that national bank shares cannot be taxed differently from State banks or their shares as to the amount of the tax.

The doctrine that the capital of a bank is the equivalent of all its shares, upon which the Wisconsin case was decided by the State court, and which happened to be true in that case, has been so often and emphatically repudiated by the Supreme Court of the United States that it cannot now be successfully relied upon. Owensboro National Bank *v.* Owensboro, 173 U. S., 664, and cases there cited. It is true, however, that if in any particular case the amount of the taxable capital substantially equals the amount of all the shares, that it matters not whether, as to an incorporated State bank, the tax is upon the capital, or upon the shares, as the tax by either mode would be the same in amount. But as the amount of the taxable capital may be much less than the amount of all the shares,
27 and always is so where a bank owns and holds non-taxable bonds, the doctrine of taxation of the capital being the equivalent of taxation of all the shares has been repudiated by the Supreme Court of the United States, and we are bound by those decisions. Our statutes as to taxation of banks and shares in banks, as well as said section 5219, have been revised and changed since the case of Frazer *v.* Siebern, 16 Ohio St., 614, and the statement in that case that the limitation as to other moneyed capital refers merely to the percentage of tax to be levied, has not been approved by the Supreme Court of the United States, but has been ruled differently by that court in cases above cited. That case is therefore not an authority as to the force, effect and construction of our present statutes on that subject, nor as to the present restriction in said section 5219, as to the rate of taxation on national bank shares. But as to the proposition that the taxation on national bank shares cannot be greater than the taxation on State banks or their shares, that case is sound.

It is also urged that when section 5219 mentions "other moneyed capital in the hands of individuals," it means other taxable moneyed capital, and that as Federal bonds are not taxable, they should be deducted from the return of the bank before fixing the amount from which to ascertain the value of each share, and People *v.* Commissioners, 4 Wallace, 244, 256, and Mercantile Bank *v.* New York, 121 U. S., 138, are cited and relied upon. Those cases do say that the phrase means "other taxable moneyed capital." But conceding that to be the meaning, it does not aid the cause of the plaintiff in error. Certainly the meaning is "taxable capital," because if it meant non-taxable capital, the shares of national banks could not be taxed at all. And here lies the distinction, the tax is upon the shares, and not upon the capital. If the tax was on the capital, the Federal bonds would have to be deducted, but being upon the shares, no such deduction is required, allowed or authorized. A State has the

power to tax both the capital and stock or shares of a corporation, unless prohibited by its constitution, and to do so would not be double taxation. Owensboro National Bank *v.* Owensboro, 173 U. S., 664, 681, 682.

It is urged against the Van Allen case, and other like New York cases, that they are not applicable in this State, because New York has no constitutional provisions like ours in reference to taxation. By this is meant that New York was not hindered by such constitutional limitations and restrictions, and was therefore free to pass laws conforming to the principles of the Van Allen case, while Ohio is so restricted by its constitution as to make it impossible to conform to that case. As the Constitution of the United States, and the acts of Congress passed in pursuance thereof, are the supreme law of the land, it may well be doubted whether the constitution of a State is of sufficient vigor to serve as an excuse for not conforming to the acts of Congress. Should we be unable to conform to section 5219 and the Van Allen case, we would be denied the right to tax national bank shares. Such shares being personal property, are required to be taxed under the provisions of our constitution: and if the claim of the plaintiff in error is right, in this regard, it would lead to the absurd result, that by reason of our constitution we cannot tax such shares, and by reason of the same instrument we must tax them.

In the case of Lionberger *v.* Rouse, 9 Wallace, 468, the State of Missouri was bound by a contract with two banks whereby it was not able to conform to the Van Allen case as to those two banks, but it conformed as to all of its other banks, and the Supreme Court of the United States held that as the State had done all within its power to conform to the laws of the United States, it might tax national bank shares at the same rate as its own banks, other than said two which held such contract; but we know of no case, and none has been cited, wherein a State has been excused from
28 conforming to section 5219 and the Van Allen case, by reason of a limitation in its constitution, and still allowed to tax the shares of national banks the same as if it had so conformed. Besides, there is no provision, limitation or restriction in our constitution to prevent us from conforming to the act of Congress, and the decisions of the United States Supreme Court, as will hereinafter appear.

Our constitution has no provision as to non-taxable Government bonds, and such bonds having been issued, and national banks thereafter established under acts of Congress, with limited power of taxation granted to the States upon the shares of such banks, it became necessary to revise and conform our tax laws to the new order of things under said sections 3701 and 5219, and our own State constitution, to the end that we might exercise the right to tax such national bank shares, and at the same time observe the provisions of our constitution as to equality of taxation. In securing equality of taxation, it must be borne in mind that exact equality is impossible and that inequalities which cannot be remedied without an infraction of the Constitution or acts of Congress, are, and of right should be, disregarded.

As unincorporated banks are allowed to deduct their non-taxable bonds from their assets, and incorporated banks are not allowed to make such deductions in fixing the amount upon which the value of the shares is calculated, it is urged that there is an inequality in taxation produced thereby which violates that principle of the Constitution which aims at equal taxation. Whether this produces such inequality as calls for a remedy it is impossible to determine. The unincorporated bank pays taxes on all of its property except non-taxable bonds, while the value of the shares of the incorporated bank is based upon the value in money of the tangible property of the bank, including such bonds, but nothing is added under our statute for the value of the franchise and privilege of carrying on a corporate business. This intangible and untaxed property of the corporation may, and often does, exceed the value of the non-taxable bonds held by unincorporated banks or individuals, and in some of the States heavy taxes are imposed on such property. The two kinds of banks cannot well be assessed by the same statute, because the unincorporated bank has no shares, no franchise, and no privilege to carry on a corporate business in which there is only a limited liability for the debts of the bank. Both are to be so taxed as to bear a burden equal to that borne by individuals, and the obligation is upon the General Assembly to pass laws to that end.

Section four of article thirteen of the constitution, provides that the property of corporations shall be subject to taxation the same as the property of individuals. Section three of article twelve, provides that the General Assembly shall provide by law for taxing all the property of banks and bankers, without deduction, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals.

And section two of article twelve, provides that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money. Then follows certain exemptions of personal property, and of an amount not exceeding two hundred dollars to each individual.

It will be noticed that the property of corporations shall be subject to taxation the same as the property of individuals. This implies that corporations shall be taxed, either by the same methods as individuals, or by separate statutes producing the same result, as in the opinion of the General Assembly shall be best. It will further be noticed that banks and bankers shall be taxed upon all their property without deduction, by such laws as will compel them to bear a burden equal to that imposed upon the property of individuals. This clearly implies that separate statutes are to be
29 passed for the taxation of the property of banks and bankers, because they are taxed without deduction, and a deduction not exceeding two hundred dollars is allowed to individuals. This matter of deductions, if nothing else, makes it necessary to have statutes for the taxation of the property of banks and bankers different from that of individuals.

Section two of article twelve seems to make provision for the

passage of laws for the taxation of the property of individuals only, but it is broad enough in its terms to include the property of banks and bankers and of all other corporations. But as separate provision is made for the taxation of banks and bankers in section three of the same article, and for the taxation of the property of corporations in section four of the next succeeding article, it seems to be thereby clearly indicated that each of those sections should have a distinct force, effect and scope of its own, but in connection with the others, so as to make a harmonious whole. It is conceded by Thurman, J., in Bank *v.* Hines, 3 Ohio St., 1, 46, that said section three has its separate force and scope, and it was said by him that there was no absolute necessity for said section four, because without it, section two would have embraced corporations. But it will be noticed that he does not say that with section four in the constitution, section two embraces the same subject. Having been thought of sufficient importance to be inserted in the constitution by the convention, and adopted by the people, section four must be presumed and held to have an object and force of its own, but in connection with said section two; and that object and scope is to enable the General Assembly to pass laws peculiarly suited and fitted for the listing and taxation of the property of corporations, so as to secure taxation on their property the same as on the property of individuals. It was then, as now, well known that in the extensive, scattered and diversified business and interests of corporations it is often difficult to bring upon the tax duplicate the full valuation of their property, and that to secure that end it might be necessary to pass laws applicable to corporations and not applicable to individuals. The same is true as to banks and bankers; but both as to corporations and as to banks and bankers, the taxation is restricted so as to be the same as that of individuals, and to thereby prevent oppression. While the courts cannot make tax laws, they can prevent inequality and oppression by enforcing the restrictions of the constitution.

Shortly after the decision of Van Allen *v.* The Assessors, 3 Wallace, 573, the General Assembly of this State enacted statutes conforming to that decision, and providing for the taxation of shares of banks, both State and national, and repealed the statutes taxing the property of such banks. The passage of those statutes was not merely a mode of fixing the taxable value of the property of incorporated banks, but it was providing for the taxation of the shares of such banks. The power of the General Assembly to pass laws taxing shares of incorporated banks in the hands of the stockholders is found in that provision of said section two of article twelve which says that laws shall be passed taxing by a uniform rule all * * * stocks, etc.

Having passed a law for the taxation of all shares, that is all stocks of incorporated banks, it repealed the law taxing the capital or property of the bank, so as to conform to the last sentence in section three of the same article, which says, "So that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." The shares of stocks

in a bank are personal property, and are employed by the owner in banking, and therefore should be taxed the same as the property of individuals. To also tax the property of the bank, less the Government bonds owned and held by it, would reduce the dividends to be received by the shareholder or stockholder, and would by such double taxation impose greater burdens upon the property employed in banking than upon the property of individuals.

So as to other corporations, the General Assembly could pass laws under section two of article twelve taxing the stocks of the corporation in the hands of its stockholders, and also taxing the property of the corporation, less the non-taxable bonds owned and held by it, but section four of article thirteen steps in and limits and restricts the power so granted by section two of article twelve, by providing that the taxation of the property of corporations shall be the same as on that of individuals. Aside from the limitations and restrictions in said sections three and four, the General Assembly might tax both the stocks and property of banks and corporations, less untaxable bonds, without thereby imposing double taxation. Owensboro National Bank *v.* Owensboro, 173 U. S., 664, 681, 682.

It is because of said limitations that it is provided in section 2746, Revised Statutes, that where the capital stock of a corporation is taxed in the name of the company, that the stock shall not be taxed and for a like reason that no provision is made for the taxation of the capital of incorporated State banks when the shareholders are taxed on their shares. The same limitations apply to national banks, but as to them there is the additional restriction contained in section 5219, Revised Statutes of the United States.

Instead of section four of article thirteen of the constitution, by a strained construction overriding the intention of the General Assembly in passing the statutes for the listing and valuation of property in the hands of individuals, and making those statutes also applicable to the listing and valuation of the property of corporations against the intention and purpose of the General Assembly, that section was inserted into the constitution for the purpose of clearly authorizing the General Assembly to pass laws for the taxation of the property of individuals, and different laws for the listing and valuation of the property of corporations, provided, however, that the result should be that the taxation of the property of both should be the same, that is, that the burden of taxation should rest equally upon all property in the State, whether held by individuals or corporations, and leaving the General Assembly free to select the methods which in its opinion would best reach that result. The limitations and restrictions in question are as to the result, and not as to the method of taxation. The result must be the same, equality of taxation, but the methods by which such result shall be attained are left to the discretion and sound judgment of the General Assembly. The obligation to pass such laws as will secure equality of taxation is by the constitution placed upon the General Assembly, as was held by this court as to section twenty-one of article two of the constitution in Dalton *v.* State, 43 Ohio St., 660.

Whether the taxation shall be upon the shares of incorporated State banks or upon their capital is also left by the constitution to the General Assembly, but whichever method is adopted, the law must be so framed that the burden upon the capital invested in the State bank will at least equal the burden placed upon national bank shares. The most convenient manner of accomplishing that result is to tax the shares of both kinds of banks, State and national, by the same sections of the statute, as is now done in this State. That method having been adopted by the General Assembly, the courts have no power to interfere and adopt a different one.

The evident object and purpose of the plaintiff in error is to so construe our constitution and statutes in connection with said sections 3701 and 5219, Revised Statutes of the United States, as to escape with a less burden of taxation than is paid upon a like amount of investment in national bank shares. This cannot be done. The burden must be equal. The taxation on national bank shares cannot be greater than upon capital invested in State banks by reason of said section 5219, and it cannot be less by reason of section two of article twelve of our constitution.

31 The statutes of this State providing for the listing and valuation of different classes of property for taxation in and by different modes and agencies, have been held to be constitutional by this court, and by the Supreme Court of the United States. Wagoner *v.* Loomis, 37 Ohio St., 571, and Cummings *v.* National Bank, 101 U. S., 153. The claim of the plaintiff in error that the United States bonds owned and held by it should be deducted from its capital stock before fixing the amount of its resources as a basis for ascertaining the value of each share of its stock, is therefore not tenable. Neither can it be allowed to pay taxes on its capital, less such bonds owned and held by it, and thereby relieve its shareholders from paying taxes on the shares held by them, because there is no statute authorizing the payment of such taxes on its capital stock, and the statute requiring payment of taxes by the shareholders being valid, it cannot be set aside or disregarded by this court. The demurrer to the petition by the court below was therefore properly sustained, and the circuit court was right in affirming the judgment.

Judgment affirmed.

32 STATE OF OHIO, }
City of Columbus, } *ss:*

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the opinion of this court in cause The Cleveland Trust Co. *vs.* M. A. Lander, treasurer, published in the Weekly Law Bulletin, page 297, of date of April 23rd, 1900, and hereto attached, is a true and correct copy thereof, and that said publication was authorized and approved by this court.

In witness whereof I have here- subscribed my name and affixed the seal of said supreme court this fifth day of June, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By JOHN P. DANA, *Deputy*.

33 In the Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Defendant. } Petition for Writ of Error.

Now comes The Cleveland Trust Company of Cleveland, county of Cuyahoga and State of Ohio, plaintiff herein, and says that on or about the 20th day of March, 1900, this court entered judgment in the above action in favor of the defendant and against this plaintiff upon the sustaining of the demurrer filed by said defendant to the petition of the plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

THE CLEVELAND TRUST COMPANY,
By GARFIELD, GARFIELD & HOWE,
Its Attorneys.

Writ of error allowed as prayed for.

JOHN A. SHAUCK,
Chief Justice Supreme Court of Ohio.

June 12, 1900.

34 [Endorsed:] # 6972. No. —. Supreme court of Ohio. The Cleveland Trust Company, plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, Ohio, defendant. Petition for writ of error. Filed Jun- 12, 1900, in supreme court of Ohio. J. B. Allen, clerk. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

35 In the Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant. } Assignment of Errors.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers

were committed by the court in the rendition of its judgment against this plaintiff appearing upon the record herein—that is to say:

I. The court erred in affirming the judgment of the circuit court in sustaining the judgment of the common pleas court on the demurrer of the defendant to the petition of the plaintiff.

II. The court erred in holding and deciding that said The Cleveland Trust Company was not entitled, in making its statement to the auditor of Cuyahoga county, Ohio, under section 2765 of the Revised Statutes of Ohio, to deduct for the purpose of taxation from its capital and surplus the amount of United States Government bonds owned by it, under and by virtue of section 3701 of the Revised Statutes of the United States, as claimed in the original petition of the plaintiff.

And said The Cleveland Trust Company prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it has lost by reason of the said judgment.

GARFIELD, GARFIELD & HOWE,
Attorneys for the Cleveland Trust Co.

36 [Endorsed:] No. —. In the supreme court of Ohio. The Cleveland Trust Company, plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, Ohio, defendant. Assignment of errors. Filed Jun- 12, 1900, in supreme court of Ohio. J. B. Allen, clerk. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

37 In the Supreme Court of the United States.

THE CLEVELAND TRUST COMPANY OF CLEVELAND, OHIO, Appellant,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Appellee.
} Prayer for Reversal.

Of October term, in the year of our Lord one thousand nine hundred.

Afterwards, to wit, on the first Monday of ——, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Cleveland Trust Company of Cleveland, Ohio, by —— ——, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the answer of M. A. Lander, as treasurer of Cuyahoga county, Ohio, and the matters therein contained are not sufficient in law for the said treasurer to have or maintain his defense against the said The Cleveland Trust Company of Cleveland, Ohio. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said M. A. Lander, as treasurer of Cuyahoga county, Ohio, whereas by the law of the land the said judgment ought to have been given for the said

The Cleveland Trust Company of Cleveland, Ohio; and the said The Cleveland Trust Company of Cleveland, Ohio, prays that the judgment of the supreme court of Ohio may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment.

J. K. RICHARDS,
Attorney for Appellant.

38 [Endorsed:] No. 6972. Supreme Court of the United States. The Cleveland Trust Company, plaintiff in error, *vs.* M. A. Lander, as treasurer of Cuyahoga county, defendant in error. Prayer for reversal. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

39 In the Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY, Plaintiff, *vs.* M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant. } Order Allowing Writ of Error.

This 12 day of June, 1900, came the plaintiff, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it; also its assignment of errors; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond, according to law, in the sum of — ($10,000), which shall operate as a supersedeas bond.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of Ohio.

40 [Endorsed:] No. —. Supreme court of Ohio. The Cleveland Trust Company, plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, Ohio, defendant. Order allowing writ of error. Filed Jun- 12, 1900, in supreme court of Ohio. J. B. Allen, clerk. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

41 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because — the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you or some of you, being the highest court of

law or equity of the said State in which a decision could be had in the said suit between M. A. Lander, as treasurer of Cuyahoga county, Ohio, and The Cleveland Trust Company of Cleveland, Ohio, wherein was drawn in question the validity of an authority exercised under a statute of said State, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of the validity of such authority so exercised, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, privilege, and exemption specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said The Cleveland Trust Company of Cleveland, Ohio, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 1st day of August, 1900, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the
42 United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12 day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States,
Northern District of Ohio, Eastern Division,
By JNO. VAN NOSTRAN, *Deputy.*

Allowed by—
JOHN A. SHAUCK,
Chief Justice Supreme Court of Ohio.

43 [Endorsed:] No. —. Supreme court. The Cleveland Trust Company, plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, defendant. Writ of error. Filed Jun- 12, 1900, in supreme court of Ohio. J. B. Allen, clerk. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

44 The Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To M. A. Lander, as treasurer of Cuyahoga county, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at the city

of Washington, District of Columbia, on the 12 day of July next, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Cleveland Trust Company of Cleveland, Ohio, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Shauck, chief justice of the supreme court of the State of Ohio, this 12th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of Ohio.

45 On this 13th day of June, 1900, service of the within citation was made upon the defendant in error, M. A. Lander, and by us and on his behalf hereby acknowledged, and appearance is hereby entered in said action by the defendant in error.

M. A. LANDER,
As Treasurer of Cuyahoga County, Ohio,
By P. H. KAISER,
County Solicitor,
F. L. TAFT,
Ass't County Solicitor,
His Attorneys.

46 [Endorsed:] No. —. Supreme court. The Cleveland Trust Company, plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, defendant. Citation. Garfield, Garfield & Howe, Garfield building, Cleveland, O., attorneys for pl'ff.

47 In the Supreme Court of Ohio.

THE CLEVELAND TRUST COMPANY, Plaintiff,
vs.
M. A. LANDER, as Treasurer of Cuyahoga County, Ohio, Defendant.

Know all men by these presents that we, The Cleveland Trust Company, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the defendant, M. A. Lander, as treasurer of Cuyahoga county, in the full and just sum of ten thousand (10,000) dollars, to be paid to the said defendant, M. A. Lander, as treasurer; to which payment, well and truly to be made, we do hereby bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of May, A. D. nineteen hundred.

Whereas lately, in the supreme court of Ohio, in a suit pending in said court between The Cleveland Trust Company, plaintiff in error, and M. A. Lander, as treasurer, defendant in error, a judgment

was rendered against said The Cleveland Trust Company, and said The Cleveland Trust Company having obtained a writ of error, filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said M. A. Lander, as treasurer, citing and admonishing him to be and
appear at a session of the United States Supreme Court, to be
48 held —:

Now, the condition of this obligation is such that if the said The Cleveland Trust Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; otherwise to be and remain in full force and effect.

THE CLEVELAND TRUST COMPANY,
By E. G. TILLOTSON, *Treasurer.*

[Seal American Surety Company, New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By J. J. SULLIVAN, *Res. Vice-Pres't.*

Attest: H. A. GARFIELD,
Act'g Res. Ass't Sec'y.

(Revenue stamp, 25 cents, on original.)

Sealed and delivered in the presence of—

—— ——,
As to prin.
CLARENCE N. WISER,
As to surety.

Approved by—
JOHN A. SHAUCK,
Chief Justice.

[Endorsed:] File — 531. Supreme court. Cleveland Trust Company *vs.* M. A. Lander, as treasurer. Filed May 22, 1900, in supreme court of Ohio. J. B. Allen, clerk. Bond.

49 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

"The regular quarterly meeting of the board of trustees of the American Surety Company of New York was held at the company's office, No. 100 Broadway, in the city of New York, on Wednesday, January 18th, 1899, at 12 o'clock noon.

"The president assumed the chair.

"On motion, David B. Sickels was elected secretary. * * *

"The secretary read the report of the nominating committee as follows:

"To the board of trustees of the American Surety Company of New York:

"GENTLEMEN: The committee appointed by the trustees of this company at their meeting held Wednesday, December 28th, 1898, for the purpose of nominating officers of the company for the ensuing year beg leave to report as follows:

"We nominate for the ensuing year the following gentlemen as resident vice-presidents at Cleveland, Ohio:

"G. A. Garretson,

"J. J. Sullivan,

"H. C. Ranney,

"Horace E. Andrews.

"Resident assistant secretaries at Cleveland, Ohio:

"William B. Uhl,

"Harry A. Garfield,

"Frederick G. Howe.

"Whereupon, on motion, the secretary was instructed to cast one ballot on behalf of the trustees present, and the aforementioned officers, * * * as recommended by the nominating committee, were declared to have been unanimously elected to their respective offices for the ensuing year.

"The following resolution was adopted:

"Resolved, That the resident vice-presidents be, and they hereby are, and each of them is hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the resident assistant secretary."

STATE OF NEW YORK, }
County of New York, } *ss:*

I, W. S. Mackellar, assistant secretary of the American Surety Company of New York, do certify that I have compared the foregoing extracts and transcripts from the record book of the board of trustees of the American Surety Company of New York with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this second day of January, 1900.

[Seal of American Surety Company, New York.]

W. S. MACKELLAR,
Assistant Secretary.

50 STATE OF OHIO,)
City of Columbus,) ss:

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the bond hereto attached is a true copy of the bond filed in this court May 22nd, 1900, in cause The Cleveland Trust Company *vs.* M. A. Lander, treasurer of Cuyahoga county, Ohio, in which writ of error has been allowed in the Supreme Court of the United States, and that said bond was approved by Hon. John A. Shauck, chief justice of the supreme court of Ohio, on the 22nd day of May, A. D. 1900, and that the tax on said bond was paid by stamp affixed to original on file in this court.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this fifth day of June, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

[Endorsed:] No. —. Supreme court of Ohio. The Cleveland Trust Co., plaintiff, *vs.* M. A. Lander, as treasurer of Cuyahoga county, defendant. Bond. Filed May 22, 1900, in supreme court of Ohio. J. B. Allen, clerk.

Endorsed on cover: File No., 17,806. Ohio supreme court. Term No., 321. The Cleveland Trust Company, plaintiff in error, *vs.* M. A. Lander, treasurer of Cuyahoga county, Ohio. Filed June 20th, 1900.

14210

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 88.

THE CLEVELAND TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was originally brought in the common pleas court of Cuyahoga county, Ohio, by The Cleveland Trust Company, a corporation organized under the laws of the State of Ohio, plaintiff in error, against M. A. Lander, treasurer of Cuyahoga county, Ohio, defendant in error, for the purpose of restraining and enjoining the said treasurer from collecting or attempting to collect from the plaintiff in error or from its individual stockholders certain taxes as the same stand charged on the duplicate of Cuyahoga county, Ohio (Record, pp. 2–5).

This plaintiff made the ordinary and legal return of its

resources and liabilities, together with the other facts required by the statutes of Ohio, to the auditor of Cuyahoga county on the Wednesday next preceding the second Monday in May, 1898, and deducted from its assets its holdings in United States Government bonds, valued at $213,274.84 (Record, pp. 2, 3).

Thereafter the auditor of Cuyahoga county refused to allow the said deduction of said Government bonds as made and claimed by this plaintiff in error and entered the valuation of the property of this plaintiff in error, including said Government bonds, upon the tax duplicate of said county and assessed taxes against the same at the rate of .02955 cents on each dollar's valuation (Record, p. 3).

Thereafter said auditor delivered to the county treasurer a true copy of the duplicates containing the tax-list required by him to be made, and the taxes which this plaintiff in error claims were so unlawfully assessed by reason of the acts of the auditor of Cuyahoga county in including the value of said United States Government bonds amount to $4,283.71 (Record, pp. 3, 4).

Thereafter the plaintiff in error duly tendered to the defendant in error the amount of taxes due, excluding the amount so assessed on said Government bonds, and the taxes which this plaintiff in error seeks to restrain and enjoin the said defendant from collecting or attempting to collect are the taxes so unlawfully assessed upon said United States Government bonds (Record, p. 4).

Thereupon this plaintiff in error filed its petition to restrain and enjoin the defendant in error from collecting or attempting to collect taxes so unlawfully assessed upon said United States Government bonds. A restraining order was allowed, as prayed for in the petition (Record, pp. 2, 3, 4, 5, 7).

Thereafter a demurrer to the original petition was filed by the defendant in error setting forth the following grounds:

"For the reason that the same does not set forth "facts sufficient to constitute a cause of action" (Record, p. 6).

Said demurrer was sustained by the court of common pleas and judgment rendered in favor of the defendant in error against the plaintiff in error (Record, p. 8).

Thereupon error was prosecuted to the circuit court of Cuyahoga county, Ohio, which court affirmed said judgment (Record, pp. 6, 7, 8).

Thereupon error was prosecuted to the supreme court of the State of Ohio, which court affirmed said judgment (Record, pp. 10, 11).

Thereupon, and to review the said judgment, this writ of error has been brought (Record, pp. 23–29).

ASSIGNMENT OF ERROR.

First. "The court erred in affirming the judgment "of the circuit court in sustaining the judgment of "the court of common pleas on the demurrer of the "defendant to the petition of the plaintiff."

Second. "The court erred in holding and deciding "that The Cleveland Trust Company was not enti- "tled, in making its statement to the auditor of "Cuyahoga county, Ohio, under sec. 2765 of the Re- "vised Statutes of Ohio, to deduct, for the purpose of "taxation, from its capital and surplus, the amount "of the United States Government bonds owned by it "under and by virtue of section 3701 of the Revised "Statutes of the United States as claimed in the "original petition of the plaintiff."

ARGUMENT.

The plaintiff in error maintains:

That under the constitution and laws of the State of Ohio, the property of a trust company organized under the laws of Ohio and conducting its business therein must be and is subject to taxation.

That the sections of the statutes of the State of Ohio which provide the method for determining this tax value, so far as they apply to such trust company, simply prescribe a convenient method for arriving at the true value in money of the property of the corporation.

That, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States Government bonds then owned by it.

That the laws governing the taxation of the shares of national banking associations and the interpretation of such laws do not control the question at issue in this case.

POINT 1.

The constitution of the State of Ohio specifically requires that the property of corporations, and especially of banking institutions, shall be taxed.

Section 4 of article 13 of the constitution provides that—

> "The *property of corporations* now existing or here-
> "after created shall forever be subject to taxation
> "the same as the *property* of individuals."

And section 3 of article 12, which has to do with the taxation of banks, provides:

> "The General Assembly shall provide by law for
> "taxing the notes and bills discounted or purchased,

"moneys loaned, and *all other property*, effects or dues,
"of every description (without deduction) of all banks,
"now existing, or hereafter created, and of all bank-
"ers, so that *all property employed in banking*, shall
"always bear a burden of taxation, equal to that im-
"posed on the *property of individuals*."

The old constitution of the State of Ohio had no such limiting clause or clauses regarding taxation. The result was great confusion in the tax laws. The burden of taxation was very unequally imposed. As shown by the debates of the convention of 1851, this very question was discussed more than any other before that body, and the purposes of the present constitutional provisions were clearly set forth, namely, to get all *property* in the State of Ohio on the tax duplicate and to value and tax *all property* at a uniform rate.

The construction of these sections was early passed upon by the supreme court of Ohio.

Exchange Bank *vs.* Hines, 3 O. S., 1.

Pages 6, 7:

"The question, whether the tax law of April, 1852,
"imposes a burden of taxation on property employed
"in banking, greater than that which is authorized
"by the constitution of the State, is one of grave im-
"port, requiring a careful and full examination.
"And the difficulties and embarrassments, to which
"it has given rise, and is still causing in the collec-
"tion of the public revenue, and enforcing the laws
"of the State, indicate the propriety of a very full ex-
"pression of opinion by the court.

"The third section of the twelfth article of the con-
"stitution, which confers the authority for taxing
"property employed in banking, is as follows:"
[Quoting the words of the section.]

> "This provision imperatively requires that all *prop-*
> "*erty*, effects, and dues of every description belonging
> "to banks should be taxed. The great variety of
> "form and condition in which property is employed
> "in banking, as well as its complex convolutions and
> "varying character, is somewhat peculiar. But those
> "things employed in this business, which constitute
> "proper subjects of taxation, in whatever form or
> "character they may be found, must possess the es-
> "sential elements and incidents of private property,
> "and are therefore capable of being clearly and cer-
> "tainly ascertained and identified."

The court there recognizes the contention of the plaintiff in error that it is simply the *property* of the bank which is sought to be taxed or can be taxed under the constitution.

While it is admitted that generally constitutional provisions will not enforce themselves, and that it is necessary for the legislature to enact laws relative thereto, there are, however, constitutional requirements which are mandatory and may in fact be self-executing.

Cooley on Taxation, 2d edition, page 326:

> "It is sometimes a serious question whether a con-
> "stitutional provision is so far complete and specific
> "in itself as to constitute a sufficient law without
> "assistance from legislation. If it is, it must be con-
> "sidered mandatory and self-executing, and effect
> "must be given to it accordingly."

What could be a more specific mandate than section 4, article 13:

> "The *property of corporations* now existing or here-
> "after created shall forever be subject to taxation
> "the same as the *property of individuals*."

Even if no special law existed providing for the manner of valuing bank property, none of that property could escape taxation, but it would all be placed on the tax duplicates under the general laws for listing and returning property.

Hence it follows that if the legislature does enact laws on a subject covered by a constitutional mandate, such laws must be construed as obeying that mandate or else be declared void, and in construing such laws the rule by which the courts are governed is clear.

State *vs.* Judges, 21 O. S., 11:

The operation and not the mere form of a statute determines its constitutionality.

State *vs.* Hipp, 38 O. S., 199:

Page 219:

> "To hold a legislative enactment to be void, where "it is not plainly in conflict with the organic law, is "as clearly unwarranted as to circumvent or nullify "a plain constitutional inhibition by holding that the "identical thing inhibited may be done under another "name."

Page 228:

> "The constitutionality of a statute depends upon "its operation and effect, and not upon the form it "may be made to assume."

The supreme court of Ohio, in the case at bar, admits that the constitution of Ohio requires the taxation of the property of banks:

> "It will be noticed that the property of corpora- "tions shall be subject to taxation the same as the "property of individuals. This implies that corpo- "rations shall be taxed either by the same methods "as individuals, or by separate statutes producing the

"same result as in the opinion of the General Assem-
"bly shall be best. It will be further noticed that
"banks and bankers shall be taxed on all their prop-
"erty without deduction by such laws as will compel
"them to bear a burden equal to that imposed upon
"the property of individuals" (Record, p. 19).

"Section 2, article XII (of the constitution), seems
"to make provision for the passage of laws for the
"taxation of the property of individuals only, but it
"is broad enough in its terms to include the property
"of banks and bankers and of all other corporations"
(Record, pp. 19, 20).

And referring to section IV of the constitution, which provides that the property of corporations shall be subject to taxation the same as individuals, the court holds:

"That object and scope is to enable the General
"Assembly to pass laws peculiarly suited and fitted
"for the listing and taxation of the property of corpo-
"rations so as to secure taxation on their property the
"same as on the property of individuals. It was then
"as now well known that in the extensive, scattered
"and diversified business and interests of corporations,
"it is often difficult to bring upon the tax duplicate,
"the full valuation of their property and that to secure
"that end it might be necessary to pass laws applica-
"ble to corporations and not applicable to individuals.
"The same is true as to banks and bankers, but both
"as to corporations and as to banks and bankers the
"taxation is restricted so as to be the same as that
"of individuals and to thereby prevent oppression"
(Record, p. 20).

Referring further to section 4, article XIII, of the constitution, the court holds:

"That section was inserted into the constitution for
"the purpose of clearly authorizing the General As-

"sembly to pass laws for the taxation of the property "of individuals and different laws for the listing and "valuation of the property of corporations; provided, "however, that the result should be that the taxation "of the property of both should be the same; that is, "that the burden of taxation should rest equally upon "all property in the State, whether held by individ-"uals or corporations, and leaving the General As-"sembly free to select the methods which, in its opin-"ion, would best reach that result" (Record, p. 21).

These quotations from the opinion of the supreme court of Ohio clearly show that that court recognizes that under the constitution of Ohio it is the property of banks that must be and is taxed; that the method of determining this value is one of convenience, but that the ultimate result is the value of the property of the bank.

However, in order to sustain the tax the supreme court of Ohio adopts the view that a tax upon the shares of a State bank is practically equivalent to a tax upon its property, and hence complies with the constitutional requirements. The court holds that taxation of both the property of the bank and the shares of stock in the hands of the holders would be double taxation and prohibited by the constitution of Ohio, and, further, that the limitations placed by the constitution are as to results, not methods (Record, p. 21).

In commenting upon that constitutional restriction the court held:

"The limitations and restrictions in question are as "to the result, and not as to the method of taxation. "The result must be the same, equality of taxation, but "the methods by which such result shall be attained "are left to the discretion and sound judgment of the "General Assembly" (Record, p. 21).

> "Whether the taxation shall be upon the shares of "incorporated State banks or upon their capital is "also left by the constitution to the General Assem- "bly, but whichever method is adopted, the law must "be so framed that the burden upon the capital in- "vested in the State bank will at least equal the bur- "den placed upon national bank shares. The most "convenient manner of accomplishing that result is "to tax the shares of both kinds of banks, State and "national, by the same sections of the statute, as is "now done in this State" (Record, p. 22).

This holding of the supreme court of Ohio clearly sustains the contention of the plaintiff in error, viz., that the constitution of Ohio requires a tax upon the property of banks.

The plaintiff in error submits that under these constitutional requirements *all property* of banks or trust companies organized under the laws of Ohio must be taxed; that the laws enacted for the listing and return of bank property must be construed as providing a method of fixing the value of such property or else be declared void in so far as they apply to such corporations.

POINT 2.

The history of the legislative enactment upon this subject shows clearly that the General Assembly has obeyed the mandate of the constitution and enacted laws for the taxing of all property of State banking institutions.

The laws in force at the time of the adoption of the present constitution relative to the taxation of banks were confused and lacked uniformity. They were changed immediately after the adoption of the present constitution and to conform with its requirements.

We call the court's attention to the legislative history of these enactments.

Volume 50, O. L., page 135. Section 19 of that enactment, page 144, reads as follows:

> "It shall be the duty of the president and cashier "of every bank or banking company that shall have "been, or may hereafter be incorporated by the laws "of this State, and having the right to issue bills for "circulation as money, to make out and return under "oath, to the auditor of the county in which such "bank or banking company may be situated, in the "month of May, annually, a written statement con-"taining,
>
> "1st. The average amount of notes and bills dis-"counted, or purchased by such bank or banking "company, which amount shall include all the loans "or discounts of such bank or banking company, "whether originally made or renewed during the "year aforesaid, or at any time previous; whether "made on bills of exchange, notes, bonds, mortgages, "or any other evidence of indebtedness, (at their "actual value in money) whether due previous to, "during, or after the period aforesaid; and on which "such bank or banking company has at any time re-"served or received, or is entitled to receive, any profit "or other consideration whatever, either in the shape "of interest, discount, exchange or otherwise.
>
> "2d. The average amount of all other moneys, "effects, or dues of every description belonging to "such bank or banking company, loaned, invested or "otherwise used or employed with a view to profit, or "upon which such bank or banking company re-"ceives, or is entitled to receive interest."

That act provided for a return of the *property* of the bank. Such *property* was then listed and taxed as other kinds of

property. That was the first expression of the legislature after the adoption of the present constitution. By that law the legislature carried into effect the intent of the framers of the constitution and the spirit and letter of the instrument, namely, taxing the *property* of the banking associations within the State. That law was changed in 1859 (56 O. L., page 201). There were two changes in the law, but neither of them affecting the point to which we wish to call the court's attention. They provided some further methods by which *property* was listed and placed on the tax duplicate against the bank itself—taxes being levied against the bank.

In 1861 (vol. 58, O. L., page 59) the law was further amended, and again the annual statement, as required to be filed by the officers of the bank, provided for a return of the *property* of the bank and a tax upon that *total property* allowing the ordinary deductions.

In 1867 (vol. 64, O. L., page 204) the law which practically is the present law was adopted by the legislature, and changed very materially the method of making the return of the *property* of the bank. This law, as we will show the court hereafter, was evidently the result of a decision of the United States court regarding the taxation of shares of national banks, and enacted for the purpose of taxing shares of national banks in accordance with the statutes of the United States.

Practically this law today is as then, and appears now as sections 2758 to 2769 of the Revised Statutes. At the time of the revision, 1880, the legislature simply rearranged the sections.

It is the contention of the plaintiff in error that these laws and the amendments thereto, being now sections 2762 to 2769, which have to do with incorporated banks, simply provide a method for fixing the value of the *property* of the State banks and not the value of the shares of the bank stock in the hands of the holders of those shares, as distinguished from the property of the bank.

Let us consider these sections seriatim.

Section 2762:

> "All the shares of the stockholders in any incorpo-
> "rated bank or banking association, located in this
> "State, whether now or hereafter incorporated or or-
> "ganized under the laws of this State, or of the United
> "States, shall be listed at their true value in money,
> "and taxed in the city, ward, or village where such
> "bank is located, and not elsewhere."

What do these words mean? They certainly are not listing or ordering to be listed the shares in the hands of the individual, else they would be listed in the place where the individual lives, as all other personal property is listed; the individual may own shares in any one of these said institutions, but he is not required to list that property where he lives. It is required to be listed by the bank in the place where the bank is located, and why? Because the people in that locality are entitled to taxation of the *property* of the banks within that locality. It is determining the value of the *property* of the bank. This form was used to meet the objection that had been raised in the State of New York upon the taxation of the shares of national bank stock.

Section 2763:

> "The real estate of any such bank or banking
> "association shall be taxed in the place where the
> "same may be located, the same as the real estate of
> "individuals."

This section follows the United States statute relating to national banks.

Sections 2764 and 2765 have to do with the form of the return.

Section 2764:

> "There shall at all times be kept in the office
> "where the business of such bank or banking asso-

"ciation is transacted, a full and correct list of the "names and residences of the stockholders therein, "and the number of shares held by each, which shall "be at all times during business hours open to the "inspection of all officers who are or may be author- "ized to list or assess the value of such shares for tax- "ation."

Section 2765:

"The cashier of each incorporated bank shall make "out and return to the auditor of the county in which "it is located, between the first and the second "Monday of May, annually, a report in duplicate, "under oath, exhibiting in detail and under appro- "priate heads, the *resources and liabilities of such bank*, "at the close of business on the Wednesday next pre- "ceding said second Monday, together with a full "statement of the names and residences of the stock- "holders therein, with the number of shares held by "each, and the par value of each share."

What would be the object of returning merely "the resources and liabilities of the bank" if it were sought to determine the value of the shares of stock? That value may be determined by the question of good will, good management, business conditions, or speculative possibilities, all entirely separate from the actual property of the bank.

The evident intent of this section is to provide the methods by which the *property* of the bank may be determined by the county auditor.

Section 2766:

"Upon receiving such report the county auditor "shall fix the total value of the shares of such banks "according to their true value in money, and deduct "from the aggregate sum so found the value of the

"real estate included in the statement of resources as "the same stands on the duplicate, and thereupon he "shall make out and transmit to the annual State "board of equalization for incorporated banks a copy "of the report so made by the cashier, together with "the valuation of such shares as so fixed by the "auditor."

What does that mean? True, it says that he shall fix the total value of the shares of such bank; but his valuation is determined by the report of the bank's resources and liabilities, and under the constitutional provisions he must fix the value of the property of the bank itself.

Why should a deduction of the assessed value of real estate be allowed if it were intended to assess the stock instead of the *property of the corporation?* As has been held in the courts on questions as to the shares of stock of the national banking associations and their taxation, no consideration is given to the character of the property of the corporation in determining the value of the shares of stock. Stock is a different kind of property, and we do not inquire into the character of the property which that stock represents if we seek to tax the stock itself; but this section shows the intent was to obtain the value of the *property* of the bank, and the proper allowance and deduction of the real estate, which bears its rate of taxation, is thus provided for.

The United States statute, section 5219, recognizes the distinction. The taxation of shares of stock in national banks is permitted under certain restrictions, but the real estate of the national bank is to be taxed as other real property is taxed, and no deduction from the value of its shares is required. The Ohio statute, in attempting to provide for the taxation of both national bank shares and the property of State banks under the same section, has confused the two distinct kinds of property. The legislature, being compelled

to tax the property of State banks, could not provide for a simple share tax, disregarding and exempting the property of the bank. The legislature under the constitution is required to provide for the taxation of the *property* of the bank. These sections simply provide a method of determining that value, except as they relate to national banks.

Leaving these sections for the moment, we call attention to sections 2808 and 2809, which provide for the State board of equalization for banks. Section 2809 is as follows:

> "Said board shall hear complaints and equalize "the value of said shares according to the rules pre- "scribed by their title for valuing and equalizing the "values of real and personal property, and if in the "judgment of the board, or a majority of them, *the* "*aggregate value of all the bank property* so reported to "said board by the county auditors is below its true "value in money, they may increase or diminish the "value of said shares by such a per cent. as will "equalize said shares to their true value in money; "provided that said board shall not increase or "reduce the grand aggregate value of bank shares as "returned by the several county auditors by more "than twenty (20) per centum."

The following clause therein, "and if in the judgment of "the board, or a majority of them, the aggregate value of "*all the bank property* so reported to said board by the county "auditors is below its true value in money," etc., again shows that the purpose of that board was to determine the valuation of the property of the bank, although nominally fixing the value of the shares.

And now let us compare these sections with those relating to unincorporated banks and bankers, and see how the legislature has interpreted the constitution regarding that class of business.

Section 2758:

"Every company, association, or person not incorporated under any law of this State or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit, shall be deemed a bank, banker, or bankers, within the meaning of this chapter."

Section 2759 provides a form of return. There is a very good reason for this form of return. A private banker may be a partnership or he may be an individual. There is no capital stock. With the incorporated bank the certificate is filed with the secretary of state; it is a corporation created by the laws of the State by which we can regulate the transaction of its business, and therefore the cashier of that bank can be made to make his return in the form provided.

Section 2759:

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

"First. The average amount of notes and bills receivable, discounted or purchased in the course of business by such unincorporated bank, banker or bankers, and considered good and collectible.

"Second. The average amounts of accounts receivable.

"Third. The average amount of cash and cash items in possession or in transit.

"Fourth. The average amount of all kinds of

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"stocks, bonds, including United States Government "bonds or evidences of indebtedness held as an in- "vestment, or in any way representing assets.

"Fifth. The amount of real estate at its assessed "value.

"Sixth. The average amount of all deposits.

"Seventh. The average amount of accounts pay- "able, exclusive of current deposit accounts.

"Eighth. The average amount of United States "Government and other securities that are exempt "from taxation.

"Ninth. The true value in money of all furniture "and other property not otherwise herein enumer- "ated.

"From the aggregate sum of the first five items "above enumerated the said auditor shall deduct the "aggregate sum of the fifth, sixth, seventh, and such "portions of the eighth items as are by law exempt "from taxation, and the remainder thus obtained "added to the amount of item nine shall be entered "on the duplicate of the county in the name of such "bank, banker or bankers, and taxes thereon shall be "assessed and paid the same as provided for other "personal property assessed or taxed in the same "city, ward or township."

What then is required? This return is made to the auditor, and the auditor deducts the aggregate sum of the fifth, sixth, and seventh and such portions of the eighth as are exempt from taxation. That is exactly what should be done by the auditor in taxing the incorporated banks. What does he deduct under this item? He deducts the Government bonds and such other bonds or stocks as are exempt from taxation. When that is done, the auditor fixes the net valuation, which, added to the amount of item nine, is entered on the duplicate in the name of such bank or bankers, and the taxes are assessed as provided for on other property.

The intention of that section is to fix the net valuation of unincorporated bank property, and it simply fixes it by a method different from that provided for in the case of the incorporated bank. To illustrate by a practical example under these sections: Five men are partners doing a business as unincorporated bankers. They deduct—or the auditor does it for them—their holdings in United States bonds from their other resources, and after the other deductions of bad debts, etc., he fixes the total value of the property of these men associated as private bankers. Supposing these five men organize an incorporated bank with the same property, with the same resources, with the same liabilities, how then do they make their return? They simply make their return by the cashier of the bank to the auditor. Will the court say, because they have become an incorporated, rather than an unincorporated institution, that by some mystic act of the law they shall then have their Government bonds taxed which were not taxed when they were unincorporated bankers?

If the contention of the defendant in error is sustained, there would result gross injustice. This construction of the law would violate the provision of the constitution that there must be uniformity in taxation, to which we will hereafter call attention. The conclusion must be, in reading these two forms of return, that they are simply provisions for getting at the value of the *property* of the bank in the most direct and satisfactory way. We have various other forms or methods for arriving at the value of corporate property. Under section 2734 of the Revised Statutes of Ohio, which defines who shall list personal property for taxation, the following provision appears:

> "of every company, firm or corporation by the presi-
> "dent or principal accounting officer, partner or agent
> "thereof; and all surplus or undivided profits held
> "by any society for savings or bank having no capital
> "stock, by the president or principal accounting
> "officer."

The railroads have a far different method for fixing the value of their property, being provided for under section 2770 *et seq.* of the Revised Statutes; the express, telegraph, and telephone companies a still different method provided for under section 2777 *et seq.*; manufacturers a still different method provided for under section 2742, and the insurance companies by section 2745 of the Revised Statutes of Ohio; but every method has for its object the determination of the property of the corporation as required under the constitution.

The supreme court of Ohio has sustained the doctrine that it is the property of State banks which is subject to taxation.

Exchange Bank of Columbus *vs.* Hines, 3 O. S., 1.

Page 7:

> "The third section of the twelfth article of the constitution, which confers the authority for taxing "property employed in banking, is as follows:
>
> "'The General Assembly shall provide by law, for "'taxing the notes and bills discounted or purchased, "'moneys loaned, and all other property, effects or "'dues, of every description, without deduction, of "'all banks now existing, or hereafter created, and of "'all bankers; so that all property employed in banking shall always bear a burden of taxation equal to "'that imposed on the property of individuals.'

Page 29:

> "The third section of the twelfth article of the constitution heretofore recited, provides, that all property, effects, or dues of every description of *all banks*, "and of *all bankers*, shall be taxed, *without deduction*. "There has been much controversy as to the true interpretation of this provision of the constitution. "The section of the constitution immediately preced-

"ing this third section, provides for taxing *all property* "of every form and description, excepting the subjects "of the few specified exemptions; and it has been said, "that there could have been no object whatever in "the third section, unless it was to tax banks and "bankers in a different mode or upon a different "principle from that which was applicable to other "persons. I am inclined to the opinion, however, "that the history of the legislation of the State on the "subject of taxation for some years prior to the adop- "tion of the constitution, as well as the circumstances "attending its formation, very plainly indicate the "purpose of this third section. Not only the *policy*, "but also the *right* of taxing *capital* employed in "banking, had been strenuously contested, and to a "considerable extent, successfully resisted. There "had also been much controversy as to the form of "property employed in banking, which should con- "stitute a basis of taxation. With a view, therefore, "of putting an end to controversy on this subject, "and of defining, with certainty, the form in which "property in this branch of business should be made "a basis for taxation, this third section was inserted "in the constitution." * * *

Page 46:

"But it is asked, Why was section three inserted "at all, if it was not intended to establish a rule as to "banks and bankers, different from the rule respect- "ing individuals? With more propriety I might "ask, Why was section four of article three inserted, "which provides that 'the property of corporations "now existing, or hereafter created, shall forever be "subject to taxation, the same as the property of in- "dividuals?' There was no absolute necessity for "this section, for without it, section two, of article

"twelve, would have embraced these corporations. "But it was inserted out of abundant caution, that "there might be no doubt either as to existing or "future corporations, what would be the rule of tax- "ation. So section three was inserted, that there "might be no doubt how existing, as well as future "banks and bankers, whether incorporated or unin- "corporated, were to be taxed; that there might be "no doubt what property of theirs was to be the ob- "ject of taxation; and, further, to deprive them of "even the $200 exemption which may be permitted "to individuals, under section two. And hence it is "that we find in it the words 'without deduction.'"

It is true that since the decisions of Exchange Bank *vs.* Hines the present law was passed, but this law does not change the underlying principles announced by that case that the property of the bank is the property which, under the constitution, is subject to taxation. The supreme court, in discussing this phase of the case at bar, holds:

"Having passed a law for the taxation of all shares, "that is all stocks of incorporated banks, it (the "General Assembly) repealed the law taxing the "capital or property of the bank so as to conform to "the last sentence in section 3, article XII of the con- "stitution, which says, 'so that all property employed "in banking shall always bear a burden of taxa- "tion equal to that imposed upon the property of indi- "viduals.' The shares of stock in a bank are per- "sonal property, and are employed by the owner in "banking, and therefore should be taxed the same as "the property of individuals" (Record, p. 20).

By this reasoning the court confuses two separate and distinct kinds of property which are recognized through the other parts of the same decision, namely, the property of the

bank is one kind of property, separate and distinct from the shares of stock in the bank which are the property of the individual. The property of the bank "is employed in banking," but the shares of stock as owned by the individual shareholder are property which is not employed in banking, but simply represents a certain undivided interest in the bank property.

The Ohio supreme court still further confuses these distinct kinds of property. It held:

> "To also tax the property of the bank less the "Government bonds owned and held by it, would "reduce the dividends to be received by the share- "holder or stockholder, and would by such double "taxation impose greater burdens upon the property "employed in banking than upon the property of in- "dividuals" (Record, p. 21).

Yet, in the same decision, the court held:

> "If the tax was on the capital, the Federal bonds "would have to be deducted, but being upon the "shares no such deduction is required, allowed or au- "thorized. A State has the power to tax both the cap- "ital and stock or shares of a corporation unless pro- "hibited by its constitution, and to do so would not "be double taxation" (Record, pp. 17, 18).

And, further:

> "So as to other corporations, the General Assembly "could pass laws under section 2 of article XII taxing "the stocks of the corporation in the hands of its "stockholders, and also taxing the property of the "corporation less the non-taxable bonds owned and "held by it; but section 4 of article XIII steps in "and limits and restricts the power so granted by "section 2 of article XII by providing that the tax-

"ation of the property of corporations shall be the "same as on that of individuals."

"Aside from the limitations and restrictions in said "sections three and four, the General Assembly might "tax both the stocks and property of banks and cor- "porations, less untaxable bonds, without thereby "imposing double taxation. It is because of said "limitations that it is provided in section 2746 R. S. "(Ohio) that where the capital stock of a corporation "is taxed in the name of the company, that the stock "shall not be taxed and for a like reason that no pro- vision is made for the taxation of the capital of in- "corporated State banks when the shareholders are "taxed on their shares" (Record, p. 21).

Is it not evident that the supreme court is thus attempting to hold that the tax upon the shares of a bank *eo nomine* is in fact a tax upon the corporate property, and hence in conformity with the Ohio constitution, yet at the same time holding that, as it is a tax *eo nomine* upon the shares, therefore, for the purpose of taxation, the character of the property of the bank must not be considered?

The supreme court of Ohio in recent decisions has accepted the doctrine announced in the case of Bank *vs.* Hines.

Treasurer *vs.* Bank, 47 O. S., 503.

On page 518 the court sustains fully the doctrine set forth in that case, and quoting the above passages, holds, page 519:

"But the standard of equality and uniformity in "taxation has been established by the constitution, "for corporations and individuals alike, and except- "ing the special exemptions from taxation mentioned "in the constitution, the rule for taxation as to banks "and bankers is not different from the rule as to "individuals."

Chapman *vs.* National Bank of Wellington, 56 O. S., 310:

The court in the Chapman case, in considering the claims of an individual to deduct debts from the value of national bank shares, fully recognizes the principle for which this plaintiff in error contends, namely, that the object of the taxing laws of Ohio is to reach the valuation of the property of State banks.

Pages 328 and 329:

> "But in this State both national and State banks "are taxed under the same section, being section 2762, "Revised Statutes, and in fixing the values of the "shares, the bank deducts its debts from its credits, "so that it pays taxes only on the net valuation. "Unincorporated banks are taxed in the same man- "ner, by deducting debts from credits, so as to pay "only on the net capital stock."

From these decisions it is clear that the supreme court of Ohio has construed the various tax laws of the State as various methods provided by the legislature to carry into effect the plain mandate of the constitution that all property of banks shall be taxed.

POINT 3.

A tax upon the shares of stock of a corporation in the hands of the owner is a tax upon a kind of property separate and distinct from the property of the corporation itself, and such a tax is not equivalent to a tax upon the property of the corporation. Hence if the tax herein complained of be held to be a tax upon shares, it follows that it is unconstitutional in that thus the property of the corporation is exempted from taxation in violation of section 3, article XII, of the constitution of Ohio.

This court has long and uniformly recognized the distinction between the property of the corporation and the property of the shareholder in the shares of stock of the corporation.

Van Allen *vs.* Assessors, 3 Wall., 573.
People *vs.* Commissioners, 4 Wall., 244.
Shelby Co. *vs.* Union Bank, 161 U. S., 149.

The rule is clearly stated by this court in the case last cited, page 154.

> "* * * The fact is well established by the de-
> "cisions of this as well as many State courts, that
> "there is a clear distinction between the capital stock
> "of a corporation and the shares of stock of such cor-
> "poration in the hands of its individual sharehold-
> "ers. So separate are these properties, and so dis-
> "tinct in their nature, that the taxation of the one
> "property is not the taxation of the other."

This distinction being recognized, it follows that the taxation of shares is not equivalent to the taxation of the property of the corporations.

This proposition as to equivalency has been definitely determined by this court for many years; a recent decision states the rule clearly:

Owensboro Nat. Bk. *vs.* Owensboro, 173 U. S., 664.

P. 676 :

"It is, however, urged that whilst the taxes may "not be in form imposed on the shares of stock in "the names of the shareholders, and may be in form "a tax on the franchise or property of the bank, "nevertheless they are equivalent to a tax on the "shares of stock in the names of the shareholders, and "therefore do not violate the act of Congress. But "this proposition concedes that the taxing statute "does not conform to the act of Congress, and yet in- "vokes its permissive authority since, as already "shown, without the grant made by the act of Con- "gress there would be no power to tax at all. Pass- "ing, nevertheless, this contradiction, and looking "beneath the mere form, we come to the substance "of things. The alleged equivalency, in order to be "of any cogency, must of necessity, contain two dis- "tinct and essential elements—equivalency in law "and equivalency in fact. Does it contain either is "the question.

"To be equivalent in law involves the proposition "that a tax on the franchise and property of a bank "or corporation is the equivalent of a tax on the "shares of stock in the names of the shareholders. "But this proposition has been frequently denied by "this court, as to national banks, and has been over- "ruled to such an extent in many other cases relating "to exemptions from taxation, or to the power of the "States to tax, that to maintain it now would have "the effect to annihilate the authority to tax in a "multitude of cases and as to vast sums of property "upon which the taxing power is exerted in virtue of "the decisions of this court holding that a tax on a "corporation or its property is not the legal equiva- "lent of a tax on the stock, in the names of the "stockholders."

In the light of these cases, if it be held that the Ohio laws impose simply a tax upon the shares of State banks, clearly the property of the bank is exempt from all taxation, and the mandatory provisions of the constitution are violated. It was claimed by counsel for defendant below that such exemption was not injurious to the rights of this plaintiff in error; hence it could not complain, but such is not the case. The injury is clear. Under the Ohio constitution all bank property shall be taxed, and this plaintiff in error is entitled to deduct from its property the value of United States Government bonds. The legislature attempts to tax the shares of this plaintiff in error, thereby preventing the deduction of its Government bonds from the value of its shares, doing indirectly that which cannot be done directly. Therefore such an attempt should be declared unconstitutional and void.

The decision of the supreme court in the case at bar avoids a determination of this important point. While admitting that the constitution requires banking property to be taxed, it evades the logical and necessary conclusion that a law exempting such property is void, and justifies such law on the ground that the tax imposed is equivalent to a property tax.

It is admitted that if there were no constitutional mandate as to the taxation of banking property there could be no objection to the substitution of a share tax for a corporate tax; but it is claimed that because of this special constitutional provision such a share tax cannot be substituted by the legislature of Ohio for a tax upon bank property. It will be found that the constitution of Ohio is unique in this special provision for taxing State bank property, and hence the point here presented has not been before this court. This court cannot properly be asked to sustain a law which, by an evasion of State constitutional provision, permits the violation of a Federal statute, even though such

evasion of the State constitution be permitted by the supreme court of such State.

POINT 4.

If it be held that the tax provided for under sections 2762 and 2769 be an equivalent to a tax upon the property of the corporation, then it must follow that all bonds of the United States owned by the bank may be deducted in fixing the value of the shares.

The Supreme Court of the United States first determined this question in the

Bank Tax case, 2 Wall., 200.

The syllabus of the case is as follows:

> "A tax laid by a State on banks, 'on a valuation
> "'equal to the amount of their capital stock paid
> "'in, or secured to be paid in,' is a tax on the prop-
> "erty of the institution; and when that property
> "consists of stocks of the Federal Government, the
> "law laying the tax is void."

Page 208:

> "Now, when the capital of banks is required or
> "authorized by the law to be invested in stocks, and,
> "among others, in United States stock, under their
> "charters or articles of association, and this capital
> "thus invested is made the basis of taxation of the
> "institutions, there is great difficulty in saying that it
> "is not the stock thus constituting the corpus or
> "body of the capital that is taxed. It is not easy to
> "separate the property in which the capital is in-
> "vested from the capital itself. It requires some re-
> "finement to separate the two thus intimately blended
> "together. The capital is not an ideal, fictitious,

> "arbitrary sum of money set down in the articles of "association, but, in the theory and practical opera- "tion of the system, is composed of substantial prop- "erty, and which gives value and solidity to the "stock of the institution. It is the foundation of its "credit in the business community."

National Bank *vs.* Commonwealth, 9 Wall., 353, page 359, the court held:

> "This capital may consist of cash, or of bills and "notes discounted, or of real estate combined with "these. The whole of it may be invested in bonds "of the Government, or in bonds of the States, or in "bonds and mortgages. In whatever it may be in- "vested, it is owned by the bank as a corporate en- "tity, and not by the stockholders. A tax upon this "capital is a tax upon the bank, and we have held "that when that capital was invested in the securities "of the Government, it could not be taxed, nor could "the corporation be taxed as the owner of such se- "curities."

This doctrine of equivalency has been uniformly sustained: a tax must be either a property tax or a share tax. If it be *eo nomine* a share tax, but in fact be equivalent to a property tax, it is a property tax. The amounts obtained from a share tax and a property tax may be equivalent without affecting the character of the tax, but the two forms of tax cannot be equivalent as they are imposed upon entirely different kinds of property. The supreme court of Ohio in the case at bar evidently attempts to sustain the power of the legislature to impose a share tax by holding that such a tax is equivalent to the property tax required by the constitution; they thereby acknowledge the tax to be a property tax. Hence, Government bonds should be deducted from the bank property for purpose of taxation.

POINT 5.

Unless incorporated banks and trust companies organized under the laws of Ohio are permitted to deduct Government bonds from their resources for the purpose of taxation, there is a gross discrimination in favor of unincorporated banks and bankers.

Section 2, article 12, of the constitution is as follows:

> "Laws shall be passed, taxing by a uniform rule, "all moneys, credits, investments in bonds, stocks, "joint-stock companies, or otherwise; and also all "real and personal property, according to its true "value in money; but burying grounds, public school-"houses, houses used exclusively for public worship, "institutions of purely public charity, public prop-"erty used exclusively for any public purpose, and "personal property, to an amount not exceeding in "value two hundred dollars, for each individual, "may, by general laws, be exempted from taxation; "but all such laws shall be subject to alteration or "repeal; and the value of all property, so exempted, "shall, from time to time, be ascertained and pub-"lished, as may be directed by law."

One of the ablest interpretations of the meaning of this section was given by the supreme court of Ohio in the case of The Exchange Bank *vs.* Hines, 3 O. S., 10:

> "The manifest effect of this constitutional provis-"ion, is to make *property* the basis, and the *sole basis* "of taxation. And the object being equality and "fairness, it requires, by a true interpretation:
>
> "1. That the taxes shall be assessed on all prop-"erty in the State, except the subjects of the specified "exemptions.
>
> "2. That the taxes shall be assessed on all property, "by a uniform rule. And,

"3. That all taxable property shall be taxed at its "true value in money."

Page 15:

"What is meant by the words, 'taxing by a uni- "form rule?' And to what is the rule applied by "the constitution? No language in the constitution, "perhaps, is more important than this; and to ac- "complish the beneficial purposes intended, it is es- "sential that they should be truly interpreted, and "correctly applied. 'Taxing' is required to be 'by a "uniform rule,' that is by one and the same unvary- "ing standard. Taxing by a uniform rule requires "uniformity, not only in the rate of taxation, but also "uniformity in the mode of the assessment upon the "taxable valuation. Uniformity in taxing implies "equality in the burden of taxation; and this equality "of burden cannot exist without uniformity in the "mode of the assessment, as well as in the rate of tax- "ation."

As defined by the supreme court of Ohio, "uniformity in taxing implies equality in the burden of taxation."

How can it be successfully maintained that there is equality if an unincorporated banker is allowed to deduct holdings in Government bonds from his total capital while the incorporated bank is not permitted to make such deduction in determining the value of its property?

As has been shown by reference to the 47 O. S., 518, and the Wellington case, 56 O. S., 328, this court has held that both incorporated and unincorporated banks should be taxed so as to pay only on the net valuation of their property. Hence deductions of non-taxable Government securities should be permitted in each case.

The lack of uniformity complained of was set forth in the

original petition of this plaintiff in error and admitted by the demurrer (Record, pp. 3, 6).

The supreme court of Ohio, in the case at bar, held as follows on this point:

> "As unincorporated banks are allowed to deduct "their non-taxable bonds from their assets, and in- "corporated banks are not allowed to make such de- "ductions in fixing the amount upon which the value "of the shares is calculated, it is urged that there is "an inequality in taxation produced thereby which "violates that principle of the constitution which "aims at equal taxation. Whether this produces "such inequality as calls for a remedy it is impossi- "ble to determine. The unincorporated bank pays "taxes on all of its property except non-taxable bonds, "while the value of the shares of the incorporated "bank is based upon the value in money of the tangi- "ble property of the bank, including such bonds, but "nothing is added under our statute for the value of "the franchise and privilege of carrying on a corpo- "rate business. This intangible and untaxed prop- "erty of the corporation may, and often does, exceed "the value of the non-taxable bonds held by unin- "corporated banks or individuals, and in some of the "States heavy taxes are imposed on such property. "The two kinds of banks cannot well be assessed by the "same statute, because the unincorporated bank has "no shares, no franchise, and no privilege to carry on "a corporate business in which there is only a lim- "ited liability for the debts of the bank. Both are to "be so taxed as to bear a burden equal to that borne "by individuals, and the obligation is upon the Gen- "eral Assembly to pass laws to that end" (Record, p. 19).

Does not the court thus disclose the unsoundness of its decisions? There is no difficulty in assessing both kinds of banks with equality and uniformity if the constitutional mandate for taxing property is obeyed; the difficulty arises when an effort is made to harmonize a share tax with the constitution. If incorporated bank property is exempted and a share tax imposed, of necessity all possibility of constitutional uniformity is gone.

POINT 6.

The property of an Ohio corporation being subject to tax, the shares of stock of such corporation in the hands of the owner are exempted from taxation.

Shares of stock are recognized in Ohio as personal property and as such are subjected to taxation in the hands of owners unless exempted by section 2746 of the Revised Statutes, which is as follows:

> "Personal property of every description, moneys
> "and credits, investments in bonds, stocks, joint-stock
> "companies, or otherwise shall be listed in the name
> "of the person who was the owner thereof on the day
> "preceding the second Monday of April, in each year;
> "but no person shall be required to list for taxation
> "any share or shares of the capital stock of any com-
> "pany, the capital stock of which is taxed in the
> "name of such company."

This section has been considered in—

Jones *vs.* Davis, 35 O. S., 474.

That case established the rule, which is now recognized in Ohio, of exempting the shares of stock of Ohio or domestic corporations in the hands of the holders of that stock. That case also recognized directly a principle for which we con-

tend in the present case, namely: When the property of the corporation is, or is required to be, taxed, the shares of the corporation in the hands of the holders are exempt from taxation.

Page 476:

"The Toledo and Wabash Elevator Company is incorporated under the laws of Ohio, and whether or not the property which it was thus required to list for taxation embraced its capital stock within the meaning of the statute is the principal question arising upon the record.

"That it did embrace it we entertain little doubt. The capital stock of a corporation consists of the money and property subscribed and paid in for the purpose of carrying on its business operations. It constitutes a corporate fund, belonging to the corporate body. The ownership of a share of stock involves the right to participate in the dividends declared from the profits of the business, and upon the dissolution of the corporation to a proportionate share of the fund remaining after payment of the corporate debts. This interest or right, however, does not enable the shareholder to withdraw any portion of the capital stock of the corporation from its control, nor to exercise any authority over it, further than to participate, to the extent of his stock, in the election of a board of managers, charged with the conduct of the business for which the corporation was created.

"The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully, within the meaning of the statute, after it has been converted into property necessary for its business operations, and for which it was subscribed, as before. * * * *For*

"*the purpose of taxation, the capital stock is represented*
"*by whatever it is invested in.*"

Page 478:

"Except in cases where the capital stock is taxed
"in the name of the corporation, the shares are to be
"listed in the name of the person owning the same
"on the day preceding the second Monday of April
"in each year; but when the *capital stock is required*
"*to be returned for taxation* in the name of the com-
"pany, the owner of the shares is expressly relieved
"from the duty to list them."

If property of a corporation is subject to tax, but by some error or omission is not placed upon the tax duplicate, the rule still obtains, and the shareholder cannot be made to suffer by reason of the neglect of a public officer.

Hubbard, treasurer, *vs.* Brush, 61 O. S., 252, p. 262:

"Although the language of that section in terms
"exempts corporate shares from taxation only where
"the capital stock is taxed in the name of the com-
"pany, yet if all of it was by law taxable, but by the
"neglect of assessing or corporate officers was not
"taxed, there would, nevertheless, be strong ground
"to hold that the shares would be exempt from taxa-
"tion in the hands of its unoffending owners, and the
"public remitted for relief against the corporation
"under the laws that provide for correcting false
"returns."

Applying this rule to the case at bar, the constitution requires that the property of this plaintiff in error must be taxed; hence, even though this property were omitted from taxation, yet the shares in the hands of its individual stockholders would be exempt. This extreme condition, how-

ever, does not exist. This plaintiff in error made a return of its taxable property. It simply deducted from its total property its holding in Government bonds.

All its property subject to taxation is upon the duplicate; hence to hold that its shares of stock are liable to tax as distinct property in the hands of its holders is a violation of section 2746, Revised Statutes of Ohio. The construction of this section by the Ohio supreme court still further shows the error in attempting to maintain that the property of a State bank is not subject to taxation.

POINT 7.

The taxation of the shares of national banks is permitted by the Congress of the United States and must be imposed in a certain definite way, namely, by a tax upon the shares and not upon the property of the bank.

The national bank tax decisions do not govern or control the question at issue in this case.

The imposition of a tax upon the shares of national banks does not prevent the taxation of the property of State banks.

I. The shares of national banks may be taxed by the States by reason of an express enabling act passed by the Congress of the United States and without regard to Government bonds owned by the bank.

Section 5219 of the U. S. Statutes:

> " * * * but the legislature of each State may " determine and direct the manner and place of tax- " ing all the shares of national banking associations " located within the State, subject only to the two re- " strictions, that the taxation shall not be at a greater " rate than is assessed upon other moneyed capital in " the hands of individual citizens of such State, and " that the shares of any national banking association,

"owned by non-residents of any State, shall be taxed "in the city or town where the bank is located and "not elsewhere." * * *

Owensboro National Bank *vs.* Owensboro, 173 U. S., 664:

This court in discussing this question held, p. 668:

"It follows then necessarily from these conclusions "that the respective States would be wholly without "power to levy any tax, either direct or indirect, "upon the national banks, their property, assets or "franchises, were it not for the permissive legislation "of Congress."

Under this act only two restrictions are placed upon the States in taxing the shares of national banks. Neither of these restrictions provides for the deduction of the investment of the bank in Government bonds, and the context shows that by the word "shares" is meant the full interest of the shareholders. Therefore the States are permitted to tax the shares without deduction.

State *vs.* Haight, collector, 31 N. J. Law, 399:

After deciding that apart from the statute the shareholders in a national bank could not be taxed on their shares without deduction for the investment of the bank in United States Government bonds, the court held, in discussing the United States statute, p. 414:

"But it is to be noticed that the provision in ques- "tion does not attempt to impose a liability to tax- "ation on the loans to the Government. Its effect is "this. It withholds from the corporation which itself "creates, a privilege which other persons possess. In "the hands of individuals, the national securities are "not liable to State taxation; in the hands of the "national banks, it is imposed as a condition to their

"existence, that such securities shall become taxable "through their shareholders."

See also State Mutual Life & Casualty Co. *vs.* Haight, 34 N. J. Law, 128.

Van Allen *vs.* Assessors, 3 Wall., 573, page 582:

"In the granting of chartered rights and privileges "by Government, especially if of great value to the "corporators, certain burdens are usually, if not gen- "erally, imposed as conditions of the grant. Accord- "ingly, we find them in this charter. They are very "few, but distinctly stated."

The court then decides that as an incident to the grant, the State is given the right to tax the shares but not the property, a proposition which is clear and indisputable; the court proceeds, page 586:

"Then as to the shares, and what is intended by "the use of the term? The language of the act is "equally explicit and decisive." * * *

"Now in view of these several provisions in which "the term shares and shareholders are mentioned, "and the clear and obvious meaning of the term in "the connection in which it is found, namely: the "whole of the interest in the shares and of the share- "holders; when the statute provides that nothing in "this act shall be construed to prevent all the shares "in any of the said associations, etc., from being in- "cluded in the valuation of the personal property of "any person or corporation in the assessment of taxes "imposed by State authority, etc., can there be a "doubt but that the term 'shares,' as used in this "connection, means the same interest as when used "in other portions of the act?" * * *

"In all these instances, it is manifest that the term,

"as used, means the entire interest of the shareholder;
"and it would be singular, if in the use of the term in
"the connection of State taxation, Congress intended a
"totally different meaning, without any indication of
"such intent."

"This is an answer to the argument that the term,
"as used here, means only the interest of the share-
"holder as representing the portion of the capital, if
"any, not invested in the bonds of the Government;
"and that the State assessors must institute an inquiry
"into the investment of the capital of the bank, and
"ascertain what portion is invested in these bonds, and
"make a discrimination in the assessment of the shares.
"If Congress had intended any such discrimination, it
"would have been an easy matter to have said so. Cer-
"tainly, so grave and important a change in the use of
"this term, if so intended, would not have been left to
"judicial construction."

"Upon the whole, after the maturest consideration
"we have been able to give to this case, we are satis-
"fied that the States possess the power to tax the
"whole of the interest of the shareholder in the
"shares held by him in these associations, within
"the limit prescribed by the act authorizing their
"organization. * * *"

The quotations from the above decisions show conclusively that the power granted to the States to tax the interest of the shareholders without deduction for Government bonds owned by the bank is not based upon the technical distinction between shares and property, but upon a construction of the word "shares" as used in the statutes—that is, the share being the whole interest of the shareholder. It is clear that the reasoning of the court recognizes that the whole interest of the share, including as it did the invest-

ment of the Government bonds, could not be taxed except under the direct permission thus granted by Congress.

Furthermore, this court, in the matter of real estate, recognizes that the right to tax the shares of national banks does not rest upon the distinction between shares and property, but upon the direct permission granted by Congress.

In the case of the Commercial Bank *vs.* Chambers, 182 U. S., 556, in considering the method of taxation of the shares of national banks under the constitution and statutes of Utah, by the terms of which the value of the real estate situated in Utah is deducted from the assessment of the shares, the court held (page 561):

> "Manifestly, the purpose was to prevent double "taxation by the State, a tax on the real estate as "such and a further tax thereon by a tax on the "stock to the extent that such real estate entered "into the value of the stock."
>
> See also City Bank of Paducah *vs.* Paducah, 2 Flippin, 75.

If real estate must be deducted in estimating the value of shares for the purpose of avoiding double taxation in States where double taxation is prohibited, it follows that such a tax on the shares is, in fact, a tax upon the property. If real estate must be deducted to prevent double taxation, is it not a necessary and logical conclusion that United States Government bonds must be likewise deducted, as the tax on the share is an indirect tax upon such bonds to the same extent and in the same manner as it is a tax upon the real estate? The only reason such a deduction is not made in the taxation of shares of national banks is that Congress has so provided, but that provision does not apply to the shares of stock of any other corporation.

II. Apart from the statutory permission granted by Congress, there is no power in the States to tax the shares of cor-

porations unless, in estimating the value of such shares, the Government bonds owned by the corporation are deducted.

(*a.*) The reason of the rule in the case of a direct tax on the bonds is that an opposite rule would result in interference with the power of the Government to borrow.

(*b.*) Such a result would likewise follow from the taxation of corporate shares.

Weston *et al. vs.* The City Council of Charleston, 2 Peters, 449:

The court held that a tax imposed by a law of any State of the United States or under authority of such a law on stock issued for loans to the United States is unconstitutional.

The court, speaking by Mr. Justice Marshall, said (page 468):

> "* * * The American people have conferred "the power of borrowing money on their Govern- "ment, and by making that Government supreme, "have shielded its action, in the exercise of this power, "from the action of the local governments. The grant "of the power is incompatible with a restraining or "controlling power, and the declaration of supremacy "is a declaration that no such restraining or control- "ling power shall be exercised.
>
> "The right to tax the contract to any extent when "made, must operate upon the power to borrow be- "fore it is exercised, and have a sensible influence on "the contract. The extent of this influence depends "on the will of a distinct government. To any ex- "tent, however inconsiderable, it is a burthen on the "operations of Government. It may be carried to an "extent which shall arrest them entirely.
>
> "It is admitted by the counsel for the defendants, "that the power to tax stock must affect the terms on "which loans will be made; * * *"

Page 469:

"The tax on Government stock is thought by this "court to be a tax on the contract, a tax on the power "to borrow money on the credit of the United States, "and consequently to be repugnant to the constitu- "tion."

In Bank of Commerce *vs.* New York City, 2 Black, 620, the court affirms Weston *vs.* City of Charleston, and interprets that decision as follows (page 631):

"Upon looking at the case of Weston *vs.* The City "of Charleston, it will be seen that the decision of a "majority of the court was not at all placed upon "the distinction we have been considering, but upon "ground much broader and wholly independent of it.

"The tax upon the stocks was regarded as a tax "upon the exercise of the power of Congress 'to "borrow money on the credit of the United States.' "The exercise of this power was interfered with to "the extent of the tax imposed by the city authorities, "that the liability of the certificates of stock to taxa- "tion by a State in the hands of an individual affected "their value in the market, and the free and unre- "strained exercise of the power."

This decision was affirmed in the Bank Tax case, 2 Wall., 200.

State Mutual Life and Casualty Company *vs.* Haight, 34 N. J. Law, p. 128:

The court held that a tax levied upon capital stock of a corporation could not be levied upon its investment in United States bonds.

By the court (page 129):

"The exemption from the power of State taxation "of corporate capital when invested in such securities

"to the extent of the investment in the absence of "congressional permission to tax it, as in the case of "the national banks, is also so clearly established, "both by decisions in the courts of the United States, "and in this State, whenever the tax is sought to be "imposed upon the stock against the corporation *or* "*in the hands of the individual owners* as to render un- "necessary any further discussion of the question."

In State, North Ward National Bank, pros., *vs.* City of Newark, 39 N. J. Law Rep., 380, at p. 382:

By DEPUE, *Justice*:

"The exemption of a corporation created as one "of the agencies of the Federal Government from "taxation by the States is dependent not upon the "nature of the agent, nor upon the mode of its "constitution, but upon the effect of the tax, whether "the tax does in truth deprive it of the power "to serve the Government, as it was intended to "serve it, or hinder the efficient exercise of its "powers." * * *

Page 382:

"In McCullough *vs.* Maryland (4 Wheaton, 316) "it was held that the bank of the United States "which was incorporated by act of Congress, was "taxable by the State of Maryland on lands which "were the property of the bank in common with "other real property in the State, and that citizens of "the State might also be taxed on the interest which "they held in the bank, in common with other "property of the same description throughout the "State."

Page 383:

> "The power of the State to tax in the hands of "stockholders the stock of national banks which is "invested in Federal securities rests upon different "grounds, the States have no inherent powers of tax- "ation in that respect. Whatever powers they have "of taxation in that form is derived exclusively from "the authority conferred by Congress." * * *

To be specific, if for the purpose of taxation the Government bonds owned by the Cleveland Trust Company cannot be deducted from the assessed valuation, a tax burden is placed upon those bonds; and in case future bonds are issued by the Government, the Cleveland Trust Company would decrease its bid for such bonds in the amount of such added tax burden and to the same extent as though the tax were imposed directly upon the bonds.

The want of power of the States to tax either directly or indirectly United States Government bonds, except under direct authority of Congress, is based upon the soundest principles of public policy, and the reasons which led to the earlier decisions are as strong today, if not stronger, than when they were first stated. The fact that individual enterprise is rapidly being superseded by corporate enterprise means that in the future Government bonds will be more and more bought and held by corporations. If the distinction upon which the permission to tax shares without deducting the value of Government bonds rests solely on the difference between shares and property, then the States, by taxing the shares of any corporation without allowance for the investments of the corporation in Government bonds, can just as effectually limit the power of the Government to borrow as by a direct tax on the bonds themselves. The effect of the Bank Tax case, 2 Wall., 200, will be nullified if the States are permitted to impose such taxes.

The words of Chief Justice Marshall, in Weston and others

vs. The City Council of Charleston, 2 Peters, 449, at page 465, should not be forgotten in this connection:

> "But it is unnecessary to pursue this principle "through its diversified application to all the contracts "and to the various operations of government. No one "can be selected which is of more vital interest to the "community than this of borrowing money on the "credit of the United States. No power has been con- "ferred by the American people on their Government, "the free and unburthened exercise of which more "deeply affects every member of our Republic. In "war, when the honour, the safety, the independence "of the nation are to be defended, when all its re- "sources are to be strained to the utmost, credit must "be brought in aid of taxation and the abundant "revenue of peace and prosperity must be anticipated "to supply the exigencies, the urgent demands of the "moment. The people, for objects the most important "which can occur in the progress of nations, have "empowered their government to make these antici- "pations, 'to borrow money on the credit of the "United States.' Can anything be more dangerous "or more injurious than the admission of a principle "which authorizes every State and every corporation "in the Union which possesses the right of taxation, "to burthen the exercise of this power at their dis- "cretion."

III. The supreme court of the State of Ohio seems to have based its decision upon the supposition that the taxation of shares of national banks was necessary, and that the act of Congress permitting the taxation of such shares is of greater force than the mandate of the Ohio constitution requiring the taxation of bank property. That court held:

> "It is urged against the Van Allen case, and other "like New York cases, that they are not applicable

"in this State, because New York has no constitu-
"tional provisions like ours in reference to taxation.
"By this is meant that New York was not hindered
"by such constitutional limitations and restrictions,
"and was therefore free to pass laws conforming to
"the principles of the Van Allen case, while Ohio is
"so restricted by its constitution as to make it im-
"possible to conform to that case. As the Constitu-
"tion of the United States, and the acts of Congress
"passed in pursuance thereof, are the supreme law of
"the land, it may well be doubted whether the con-
"stitution of a State is of sufficient vigor to serve as
"an excuse for not conforming to the acts of Congress.
"Should we be unable to conform to section 5219 and
"the Van Allen case, we would be denied the right
"to tax national bank shares. Such shares being
"personal property, are required to be taxed under
"the provisions of our constitution; and if the claim
"of the plaintiff in error is right, in this regard, it
"would lead to the absurd result, that by reason of
"our constitution, we cannot tax such shares, and by
"reason of the same instrument we must tax them"
(Rec., p. 18).

Thus it appears that the court considers the question of taxation of the shares of national banks rather than the question at issue in the case. The court expresses the fear that the State would lose the power to tax the shares of national banks if the deduction of Government bonds from the property of State banks for the purpose of taxation is permitted.

The court held (Rec., p. 16):

"To allow incorporated State banks to deduct their
"Government bonds from their returns for taxation,
"and deny that right to national banks, would be to
"compel the latter to pay greater taxation on the

> "same investment than the former. To prevent such "a result was the object of said section 5219. It, "therefore, follows that in order to retain the right "to tax national bank shares without deducting the "bonds held by the bank from its return, we must "in like manner tax the shares of incorporated State "banks, or else impose a tax of equal amount upon "the property of State banks."

We submit that the question at issue in this case must be determined regardless of the effect it may have upon the power of the State of Ohio to tax the shares of national banks.

But, in answer to the argument made by the supreme court, we submit that the deduction by State banks of their holdings in Government bonds will not affect the power of the State of Ohio to tax the shares of national banks. One of the restrictions placed by Congress upon the taxation of national bank shares is "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The court in People *vs.* Commissioners, 4 Wall., 244, in holding that national bank shares might be taxed and no deduction made for investment of the bank in United States Government bonds, said (page 256):

> "It is argued that the assessment upon the shares "of the relator is at a greater rate than that of the "personal property of individual citizens, upon the "ground that allowance was made on account of "United States securities, held and owned by them, "when at the same time the deduction was disallowed "to him.
>
> "The answer is, that upon a true construction of "this clause of the act the meaning and intent of the "law-makers were that the rate of taxation of the

> "shares should be the same, or not greater, than upon
> "the moneyed capital of the individual citizen which
> "is subject or liable to taxation."

The act of Congress passed in June, 1864, relating to the taxation of the shares of national banks contained the restrictive clause: "The tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

In February, 1868, this section of the national banking act was amended by striking out the above restrictive clause relative to the taxation of the shares of State banks. The supreme court of the State of Ohio, in the case at bar (Rec., p. 16), held as follows:

> "Section 5219 was materially changed by the
> "amendment of February 10, 1868, whereby the pro-
> "vision as to the tax on shares of State banks was
> "omitted, and the restriction that the taxation on
> "national bank shares shall not be at a greater rate
> "than on other moneyed capital, was inserted."

But the learned court was in error; the restriction that the taxation of national bank shares shall not be at a greater rate than on other moneyed capital in the hands of individual citizens was in the original act of 1864. The amendment in 1868 simply omitted the restriction regarding the shares of State banks.

The Van Allen case was decided prior to the amendment of 1868, and was based upon the clause relative to State banks, which was afterwards stricken out.

As to exactly what is meant by the term "moneyed capital" as used in the banking act, the opinion of this court in the case of the Mercantile National Bank *vs.* New York, 121 U. S., 138, is particularly full and instructive.

The rule as laid down by this court is clear that the discrimination against national bank shares in matters of taxation sought to be prevented by Congress is strictly limited; that the moneyed capital must be taxable moneyed capital, and that the rate and valuation upon such taxable moneyed capital must not be imposed in such a way as to effect a discrimination against the shares of national banks. Hence it follows if the property of the State bank is that which is subject to taxation under the laws of the State of Ohio, the bonds of the United States must be deducted from that property, and such deduction would not be a discrimination against the national banks in the matters of taxation, for the reason that such bonds are *non-taxable* "moneyed capital."

The taxation of the property of the State banks should be, so far as the national banks are concerned, in exactly the same position as is the taxation of the property of the private bankers and unincorporated banks. In Exchange Bank *vs.* Miller, 19 Fed. Rep., 373, the court holds that moneyed capital refers "to other taxable moneyed capital."

The fear expressed by the supreme court of the State of Ohio that unless a tax upon the shares of the State banks be sustained it would be impossible to tax the shares of national banks is groundless. This question was definitely determined in the case of Van Slyke *vs.* The State, 23 Wis., 655:

> SEC. 1, Syll. "Under the national banking act, a "State may tax the shares of national banks therein "located, although it does not tax *eo nomine* the "*shares* of banks organized under its own authority, "but only their *capital;* provided such tax is a full "equivalent for that imposed on the national banks."

Page 665, after discussing Van Allen case, the court holds:

"I find no other decision of that court, or opinion "intimated, in conflict with the position assumed in "these and other cases; and I therefore conclude that "the States may lawfully tax the capital of their own "banks and the shares in the national banks, pro- "vided such be not unequal or so imposed as to dis- "criminate in favor of the State banks and against "the national banks."

This case was affirmed by this court, 154 U. S., 581.

The supreme court of Ohio in the case of Frazer *vs.* Siebern, 16 O. S., 615, has held that the tax upon the property of the State banks would not prevent a proper tax upon the shares of national banks. In that case the court, while holding that the State banks could deduct their Government bonds from their capital, and that the national banks could not deduct them from the shares of stock, held further:

Page 625:

"It by no means follows, however, that the plain- "tiffs are entitled to an unconditional injunction "against the collection of the tax. *They ask equity* "*and must do equity.* They invoke the exercise of an "extraordinary power of the court for their relief, "and the court in its discretion should refuse that "relief, except upon conditions that are equitable and "just. We think, therefore, that the injunction should "only be granted upon the condition that the plaintiffs "or their bank, shall first pay to the treasurer of Hamil- "ton county a sum that will be *a pro rata equivalent* "*for the tax imposed upon the State and independent* "*banks, under the act of 1861, that is to say, such sum* "*as might lawfully have been assessed against the plain-* "*tiffs or their bank, under said act had it been one of* "*said State banks, etc.*"

CONCLUSION.

In brief, the contention of this plaintiff in error is as follows:

First. The constitution of the State of Ohio specifically requires that the property of corporations, and especially banking institutions, shall be taxed. Therefore, in determining the taxable value of the property of the plaintiff in error, the amount of the Government bonds then owned by it must be deducted.

Second. The history of the legislative enactment upon this subject shows clearly that the General Assembly has obeyed the mandate of the constitution and enacted laws for the taxing of all property of State banking institutions. The existing laws simply provide a method for the ready determination of the taxable value of banking property, and hence, in fixing the return made under these laws, the value of the Government bonds owned by this plaintiff in error should be deducted.

Third. A tax upon the shares of stock of a corporation in the hands of the owner is a tax upon a kind of property separate and distinct from the property of the corporation itself, and such a tax is not equivalent to a tax upon the property of a corporation. Hence, if the tax herein complained of be held to be a tax upon shares, it follows that it is unconstitutional in that the property of the corporation is thus exempted from taxation in violation of section 3, article XII, of the constitution of Ohio.

Fourth. If it be held that the tax provided for under sections 2762 and 2769 of the Revised Statutes of Ohio be equivalent to a tax upon the property of a corporation, then it must follow that all bonds of the United States owned by the bank must be deducted in fixing the value of the shares.

Fifth. Unless incorporated banks and trust companies organized under the laws of Ohio are permitted to deduct Government bonds from their resources for the purpose of taxation, there is a gross discrimination in favor of unincorporated banks and bankers, and there is a violation of the provision of the constitution of Ohio which requires uniformity in taxation.

Sixth. The property of an Ohio corporation being subject to tax, the shares of stock of such corporation in the hands of the owner are exempted from taxation.

Seventh. The taxation of the shares of national banks is permitted by the Congress of the United States and must be imposed in a certain definite way, namely, by a tax upon the shares and not upon the property of the bank.

Under this act of Congress the shares of national banks may be taxed without regard to the character of the investment of the capital of the bank. Hence Government bonds owned by national banks may, by the permission of Congress, be indirectly subjected to a tax. This permission, however, has not been extended to the direct or indirect taxation of Government securities owned by corporations other than national banks.

The national bank decisions do not govern or control the question at issue in this case for the reason that the right granted by Congress to the States to tax the shares of national banks does not extend to the shares of stock in other corporations.

The imposition of a tax upon the shares of national banks does not prevent the taxation of the property of State banks.

The State of Ohio is not required to tax the shares of national banks. It simply *may* do so. The State is, however, required to tax the property of State banks. Having fulfilled that requirement, its right to tax the shares of national banks is restricted in this particular, to wit, that

such taxation shall not be at a greater rate than is assessed upon other moneyed taxable capital.

Therefore, this plaintiff in error has the right to deduct from its taxable property the amount of United States Government bonds owned by it, regardless of the effect that such deduction might have upon the taxation of the shares of national banks.

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HARRY A. GARFIELD,
JAMES R. GARFIELD,
FREDERIC C. HOWE,
Of Counsel.

CLEVELAND, OHIO, *October* 26, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 88.

THE CLEVELAND TRUST COMPANY,

PLAINTIFF IN ERROR,

vs.

M. A. LANDER, Treasurer of Cuyahoga County.

Brief for Defendant in Error.

P. H. KAISER, *County Solicitor.*

O. L. NEFF, *Assistant County Solicitor.*

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CLEVELAND, OHIO.

In the Supreme Court of the United States.

THE CLEVELAND TRUST COMPANY,

PLAINTIFF IN ERROR,

vs.

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY,

DEFENDANT IN ERROR.

Statement of the Case.

An act of the Auditor of Cuyahoga County is the wrong for which the plaintiff, in its petition, seeks a remedy.

The Auditor fixed the value of the shares of stock of the plaintiff at their true value in money, as he was required to do by Section 2766, R. S. of Ohio. In fixing that value he included and took into account, among other things, the value of certain non-taxable United States bonds owned by the plaintiff, and this is the act which the plaintiff alleges to be wrongful and unlawful.

In the petition occur these words, "Wherefore, the "plaintiff submits that said Auditor of Cuyahoga County "had no authority or power to include said U. S. bonds at a "valuation of ..... any ..... sum, in fixing "the valuation of the shares of this plaintiff."

It thus appears that the real question raised upon the record in this case is whether, in fixing the value of shares of stock of an incorporated bank, under Section 2766, R. S. of Ohio, the County Auditor has a right to include, and to take account of the value of non-taxable United States bonds owned by the corporation.

Counsel for plaintiff have, with much ingenuity, raised and discussed a very different question. Plaintiff's counsel affirm, first, that the system of legislation found in Sections 2762 to 2769, R. S. of Ohio, both inclusive, provides a plan for taxing, not the shares of stock in an incorporated bank, but for taxing the property of the corporation itself, and second, that in estimating the value of the property of the corporation for taxation, non-taxable United States bonds belonging to the corporation are not to be included.

Argument.

The second of the above propositions, we deem it unnecessary to discuss, for we deny that the record raises any such question. The *petition* says that in valuing the *shares* of stock in the plaintiff bank, the Auditor ought not to have included the value of the non-taxable United States bonds owned by the plaintiff corporation.

Counsel for plaintiff, in *argument*, affirm that in valuing the *property of the corporation* the Auditor ought not to include the non-taxable United States bonds belonging to the corporation.

It is obvious, therefore, that counsel have discussed a proposition which does not arise upon the record in this case. Indeed, the *petition avers* that the Auditor was engaged in fixing the value of *shares of stock* when he did the unlawful act complained of, while counsel in their *argument* claim that the Auditor was not engaged in fixing the value upon shares of stock, when he committed the error complained of, but was engaged in fixing the value of the *property belonging to the corporation itself*.

There is, therefore, clearly an *incongruity between the allegations* made in the petition, and the line of *argument* pursued by plaintiff's counsel.

It is well settled that a State may tax the shares of stock in an incorporated bank at their full value, notwithstanding the capital of the bank is partially or wholly invested in non-taxable United States bonds.

> "The act of June 3, 1864, 'To provide a "national currency,' etc., rightly construed, sub-"jects the shares of the banking associations au-".horized by it, and in the hands of shareholders, to taxation by the States under certain "limitations (set forth in its 41st section) without regard to the fact that a part or the whole "of the capital of such association is invested in "national securities declared by the statutes authorizing them to be 'exempt from taxation "by or under State authority.'"
>
> Van Allen vs. The Assessors, 3 Wallace, 573.

> "Shares in banks, whether *State Banks* or "those organized under the act of June 3d, 1864, "are liable to taxation by the State under certain "limitations (set forth in Section 41 of the act), "without regard to the fact that the capital of "such banks is invested in bonds of the United "States, declared, by statutes creating them, to "be exempt from taxation by or under State au-"thority."
>
> People vs. The Commissioners, 4 Wallace, 244.

> "The shares in national banks thus to be "taxed, are to be understood as the individual "property, or *choses* of the stockholders, as con-

> " tradistinguished from aliquot parts of the capi-
> " tal and property of the bank, and as such, may
> " be taxed at their full value, without deduction
> " for the franchise, for real estate otherwise
> " taxed, or for untaxable bonds owned by the
> " bank."
>
> Frazier et al. vs. Seibern et al., 16 O. S., 614.

But plaintiff's counsel claim that we are not, in reality, dealing with the question of the taxation of the *shares of stock* of the corporation, but with the question of the taxation of the *property of the corporation itself*, and that, therefore, the authorities above cited have no application to the case at bar.

While we deny that the record raises any question, whatever, in respect to the taxation of the *property of the corporation itself*, we will pay sufficient respect to our opponent's claim to give it an examination. The question, then, for the present is, does the legislation found in Sections 2762 to 2769, R. S. of Ohio, and related sections, constitute a scheme for the taxation of the *property belonging to incorporated banks*, or for the taxation of the *shares* of stock in such corporation.

Plaintiff's counsel say that the constitution of the State of Ohio specifically requires that the property of corporations, and especially of banking institutions, *shall* be taxed, and cites Section 4 of Article 13, and Section 3 of Article 12, of the constitution, which provides that the prop-

erty of corporations shall be subject to taxation the same as the property of individuals, and that the General Assembly shall provide by law for taxing the property of banks and bankers, so that all property engaged in banking shall bear a burden of taxation equal to that imposed upon the property of individuals.

It may be remarked that those provisions of the constitution are not self-executing, and that they enter into our scheme of taxation only to the extent that legislation has been enacted to carry them into effect.

No Ohio case has been cited which even hints that those provisions of the constitution in, and of themselves, impose any tax, whatever, upon any corporation, bank or banker. In order, therefore, to determine whether the *property of banking corporations*, rather than the *shares* of stock in such corporations, is made the subject of taxation, we must look to see what the legislature has said and done upon this subject.

Counsel for plaintiff in error say that the history of the legislative enactments upon this subject shows, clearly, that the General Assembly has obeyed the mandate of the constitution, and has enacted laws for taxing all *property of State banking institutions*. To support this proposition, counsel cite

50 O. L., 135, Section 19,

and

58 O. L., 59.

The legislation found in those volumes, it is claimed, shows that at the time it was enacted and in force, it was the legislative policy of the State to tax the *property of banking corporations*, rather than the *shares* of stock in those corporations.

We do not deem it needful to controvert that proposition, but what we do claim is that, even if such were conceded to have been the policy of the State during that period of time, the State changed its policy by enacting, on the 16th day of April, 1867, 64 O. L., 204, the act entitled "An act "to provide for the taxation of bank shares and bankers." The scheme of taxation contained in that act was essentially the same as that found in Sections 2762 to 2769 R. S., both inclusive.

Plaintiff's counsel well say, in respect to this change, "This law * * * was evidently the result of a decis- "ion of the United States court regarding the taxation of "*shares* of national banks."

In

Owensboro National Bank vs. Owensboro, 173 U. S., 674,

on page 679, the Court, referring to the decision in Van Allen vs. The Assessors, 3 Wall., 573, and to the tax there imposed, said:

> "It (the tax) was in that case attempted to "be sustained on the same ground relied on here,

> "that the tax on the *capital* was equivalent to
> "the tax on the *shares*, as respected the share-
> "holders. But the position was answered that,
> "admitting it to be so, yet, inasmuch as the
> "*capital* of the *State* banks may consist of the
> "*bonds of the United States*, which were *ex-*
> "*empt* from *State taxation*, it was not easy to
> "see that the *tax* on the *capital* was equivalent to
> "a tax on the *shares*."

Inasmuch, therefore, as the Supreme Court of the United States has held that the imposing of a tax upon the *property* owned by a *State* bank was not the legal equivalent of a tax imposed upon the *shares* of stock in a *national* bank, and inasmuch as the State of Ohio desired to bring itself within the permission of Congress, to tax *shares* of *national* banks, the State *changed* its system of taxing its own banks; that is, in such case, it taxed, not the *property of the corporation*, but the *shares* of stock in the corporation.

This history, therefore, of the *reason* for the *change* in the State's system of taxation, furnishes a most complete revelation of the true purpose and *character* of that change.

The change proceeded upon, and grew out of the theory that a tax on the *property belonging to a bank*, is not, necessarily, the legal or actual equivalent of a tax on the *shares* of stock in the corporation. It had been held that under a system of taxing *shares* of stock, the value of non-taxable United States bonds owned by the corporation, could not be deducted in fixing the value of the *shares*, but the val-

ue of non-taxable United States bonds could, and must be deducted, under a system of taxation of the *property of the corporation*. This history, therefore, shows that the change made in the Ohio system of taxation relating to incorporated banks, was a cutting loose from taxation of the *property of a corporation*, and was the adoption of another and a different system altogether, to-wit: the taxation of a species of property which was not necessarily the legal or actual equivalent of the property of the corporation, but which had been decided by the Supreme Court of the United States to be not the equivalent for taxation, of the property of the corporation.

The Supreme Court of the United States, prior to the passage of the act of April 16th, 1867, (64 O. L. 204), had said, practically, that a State might tax shares in national banks, provided it also taxed *shares* in incorporated *State* banks. This holding of the Supreme Court of the United States was equivalent to saying to the States that, *unless* they did tax *shares* of stock in their incorporated banks, they would not be permitted to tax *shares* in *national* banks. Ohio desired to tax *shares* in *national* banks. I order to do this she was compelled to tax *shares* in her incorporated *State* banks. This, as plaintiff's counsel well say, had not been done in Ohio prior to 1867. If, therefore, Ohio desired to tax *shares* of stock in *national* banks, she was compelled to *change* her system of taxation relating to incorporated *State*

banks, and to place the tax, not upon the *property belonging to the incorporated bank*, but upon the shares of stock in such bank. This is precisely what the State undertook to do by by the act of April 16th, 1867 (64 O. L., 204).

One of the very strong reasons given by the Supreme Court of the United States for requiring States to tax *shares* of stock in *State* banks rather than the *property belonging to such banks*, was the fact that a large part, or possibly the whole, of the *property of a State* bank might be invested in *non-taxable United States bonds*, as is the case with the present plaintiff in error, and thus the *property of the incorporated bank* would largely, if not entirely, escape taxation, while *shares* of stock in *national* banks would be taxed at their full value, without any deduction of the value of non-taxable United States bonds, which the *national bank* might hold. This would create a *discrimination* against national banks, which the law of Congress would not tolerate.

The Bank Tax Case, 2 Wallace, 200, was decided at the December term, 1864; *Van Allen vs. The Assessors*, 3 Wallace, 573, was decided at the December term, 1865, and *People vs. Commissioners*, 4 Wallace, 244, was decided at the December term, 1866; *Frazier et al. vs. Seibern et al.*, 16 O. S., 614, was decided February, 1866. These decisions, therefore, immediately preceded and brought about the passage of the Ohio act of April 16th, 1867 (64 O. L., 204).

In *Van Allen vs. The Assessors*, 3 Wallace, 573, syllabus 3, mention is made of the fact that the New York stat-

ute, then under consideration, did not tax *shares* of stock in its *State* banks, but taxed the *property belonging* to the *banks*. This, of course, is precisely what the Ohio law did prior to 1867.

In view of the above recited history of the decisions of the United States and Ohio Supreme Courts, and of the legislation of Ohio, it seems strange that plaintiff's counsel, with such history in mind, should claim that the Ohio statutes, now under consideration, provide for the taxation, not of *shares* of stock in incorporated State banks, but for the taxation of the *property belonging to such corporation*.

A mere inspection of the present legislation, and of that in the annual volumes from which the present sections were taken, reveals, most clearly, that the principal subject matter of the legislation was *shares* of stock, and *holders* of such stock. The act of April 16th, 1867, 64 O. L., 204, is entitled, "An act to provide for the taxation of bank *shares* "and bankers." It will be observed that no mention here is made of *banks*. In 73 O. L., 251, is an act entitled, "An act "to provide for the equalization of the value of bank *shares* "for taxation." In 74 O. L., 88, is an act entitled, "An act "to provide for the equalization of the valuation of bank "*shares* for taxation, and to repeal an act therein named."

Out of these acts grew Sections 2808, 2809 and 2810, R. S. of Ohio, establishing a board "for the equalization of

"the *shares* of incorporated banks," whose duty it is to "*ex-*
"amine * * * the value of said *shares* as fixed by the
"County Auditor." (Section 2808, R. S. of Ohio).

It is further made the duty of that board to "hear "complaints and equalize the value of said *shares*," and to "increase or diminish the value of said *shares* by such a per "cent. as will equalize said *shares* to their true value in "money; provided, that said board shall not increase or re-"duce the grand aggregate value of bank *shares* as returned "by the several County Auditors by more than twenty per "centum." (2809, R. S. of Ohio).

"The Auditor of State shall forthwith, after such "equalization shall have been made, certify to the Auditors "of the proper counties, the valuation, as equalized, of the "*shares* of banks. * * * " (2810, R. S. of Ohio).

It is obvious that this Board of Equalization has to do with *shares* of stock in incorporated banks, rather than with the property of the banks themselves.

Section 2762, R. S. of Ohio, provides:

"All the *shares* of the stockholders in any incorpo-"rated bank * * * shall be listed at their true value in "money. * * * "

Section 2764 provides:

"There shall * * * be kept * * * a full "and correct list of the names and residences of the *stock-*"*holders* * * * and the number of *shares* held by

"each, which shall be * * * open to the inspection of "all officers who are or may be authorized to list or assess "the value of such *shares* for taxation."

Section 2765 provides:

"The cashier of each incorporated bank shall make "out and return to the Auditor of the county * * * a "full statement of the names and residences of the *stock-* "*holders* therein, with the number of *shares* held by each, "and the par value of each *share*."

Section 2766 provides:

"Upon receiving such report, the County Auditor "shall fix the total value of the *shares* of such banks, accord- "ing to their value in money * * * and * * * "transmit to the annual State board * * * a copy of "the report so made by the cashier, together with the valu- "ation of such *shares* as fixed by the Auditor."

Section 2839 provides:

"Any taxes assessed on any *shares* of stock or the "value thereof, or any bank or banking association, shall be "and remain a lien upon such *shares* * * * until such "taxes are paid; and in case of the non-payment of such tax- "es * * * it shall be unlawful for the cashier * * "* to transfer, or permit to be transferred, the whole or "any portion of said *stock*, until the delinquent taxes there- "on * * * shall be paid in full; and no dividend shall

"be paid on any *stock* so delinquent, so long as such taxes
" * * * remain due and unpaid."

Section 2840 permits the bank to pay taxes on the *shares*, and deduct the same from dividends.

These quotations from the statute make it obvious that the legislature was dealing with *shares of stock*, and with *shareholders*, and not with the property of the corporation.

Under Section 2762, shares of stock in an incorporated Ohio bank are to be listed and taxed where the bank is located, and not necessarily where the owners of the shares reside. Plaintiff's counsel draw from this the inference that it is the *corporation's property*, and not the shares of stock, that is being taxed, because, they say, the *situs* of the shares of stock is at the place of residence of the owners of those shares. Generally speaking that is true, but the Ohio Supreme Court held that the *situs* of intangible property is a matter wholly within the control of the legislature; and in

Hubbard, Treas., vs. Brush, 61 O. S., 252, in syllabus 2,

that Court said:

"Choses in action, whether book accounts,
"promissory notes, or the like, of *foreign* corpo-
"rations that are kept in this State and arise out
"of the corporate business transacted here, are

> " subject to taxation under the provisions of
> " Section 2744, Revised Statutes."

Furthermore, taxation of shares of stock in an incorporated bank being in *lieu* of taxation of the property of the bank, it is highly proper that the shares should be taxed where the bank itself is located.

After quoting Section 2763, relating to the real estate of a bank, and, doubtless, also, having in mind Section 2766, which requires the Auditor to deduct from the aggregate resources the value of the real estate in estimating the value of the shares of stock, plaintiff's counsel inquire " why " should a deduction of the assessed value of the real estate " be allowed, if it were intended to assess the stock instead " of the property of the corporation?"

We answer by inquiring, if it were intended to assess the *property of the corporation* instead of the shares of stock, why should a deduction of the assessed value of the *real estate* be allowed? This provision as to deduction of real estate is an absolutely conclusive proof that the scheme is not one for the assessment of the *property of the corporation*. If the Auditor were fixing the value of *all* the corporation's property, why should he deduct a *portion* of that very property? and would a *deduction* of the value of a *part* of the property enable him to fix a value upon the *whole* of the *property?* The notion is an absurdity, and an incongruity.

After quoting Section 2764, which requires a full and correct list of the names and residences of the stockholders of a bank, and the number of shares held by each, to be kept in the office of the bank, and open during all business hours, to the inspection of taxing officials, plaintiff's counsel say, that these provisions are inserted in the statute because the United States Court has held that the States cannot tax the property of national banks, but can tax shares of stock in such banks. The fact is, as Section 2762 distinctly states, that the system of taxation, under consideration, relates to State banks and United States banks alike, and these requirements in Section 2764, respecting the names and residences of stockholders, and amounts of shares of stock held by them, all go to show that the system is one that has to do with *shares and shareholders*, rather than with the property of the bank itself.

After quoting Section 2765 plaintiff's counsel inquire, "What would be the object of returning 'the resources and "liabilities of the bank' if it were sought merely to determ-"ine the value of the shares of stock?" The object is that the Auditor may be furnished with data from which to form an intelligent estimate of the true value of the shares of stock.

After quoting Section 2766, which requires the Auditor to fix the total value of the shares of such banks, plain-

tiff's counsel say: "but under the constitutional provision he "must fix the value of the property of the bank itself." To this it may be answered that the value of the property of the corporation is always *one element*, and, indeed, the chief element, in determining the value of the shares of stock. To be sure, other considerations, such as good will, the franchise, the business ability and reputation of the managers of the bank, enter into the calculation. So that when the Auditor estimates the value of the shares of stock, he *necessarily includes* in that estimate the value of the property of the corporation, and the constitutional provision requiring the property of the corporation to be taxed is, to all practical intents and purposes, complied with. The value of the shares of stock cannot well be less than the value of the property of the corporation, but it may be, and usually is, far in excess of that value.

The property belonging to incorporated State banks (except real estate) is not taxed in Ohio, for the reason that taxation of the shares of stock in such corporations, necessarily includes, practically, the taxation of all property engaged in the banking enterprise. If, under Section 2746, *shares of stock* in a corporation are exempt when all the property of the corporation is taxed in Ohio, then *vice versa*, if all the shares of stock in a corporation are taxed in Ohio, the property of that corporation may, and should be, and is, exempt.

Counsel for plaintiff quote Sections 2758 and 2759, relating to unincorporated banks and bankers, and thus make it appear that that class of banks is taxed upon the property of the bank, and that in estimating the value of the property belonging to that class of banks, the value of non-taxable United States bonds is deducted, and from all that, draw the inference that the scheme of taxation is identical with the one found in Sections 2762 and 2769.

The argument is that unincorporated banks are taxed upon their property, therefore, shares of stock in incorporated banks are not made the subject of taxation. It is clear that the system of taxing *shares of stock* cannot possibly be applied to a bank which has no shares of stock. In the case of individual or partnership banks or bankers, there is no other system of taxing that can be adopted, except that of taxation of the property belonging to such banks and bankers, and, therefore, that system has been adopted.

It is equally obvious that when the legislature has to do with incorporated banks which have shares of stock owned by their shareholders, another system of taxation may be adopted which will, in practical effect, accomplish the taxation, not only of all the property belonging to the bank, but, also, such added value as the shares of stock may have over and above the value of the mere property of the corporation.

This last system is the one which the legislature has adopted for incorporated banks. Surely the incorporated banks cannot complain of the system, because, under it, their

corporate property (except real estate) escapes taxation entirely, in the name of the corporation, while the individual banker does not escape taxation unless his indebtedness exceeds his credits.

* * *

A supposed case is introduced by counsel for plaintiff, for the purpose of showing that if the legislation now under consideration be regarded as a system for taxing the shares of incorporated State banks, and not for taxing the property belonging to the banks themselves, the constitutional requirement of uniformity, as between unincorporated and incorporated banks, will be grossly violated.

The illustration, in its substance, is this: Suppose five men as partners, owning certain assets, among which are non-taxable U. S. bonds, engage in banking. When they are called upon to list their property for taxation, they may deduct their non-taxable United States bonds. But suppose they dissolve their co-partnership, and form a corporation under the State laws for banking, using precisely the same assets in carrying on their banking business as a corporation, plaintiff's counsel then inquire, "How, then, do they make "their return? They simply make their return by the cash- "ier of the bank to the Auditor. Will the Court say, because "they have become an incorporated, rather than an unincor- "porated institution, that by some mystic act of law they "shall then have their government bonds taxed, which were "not taxed when they were unincorporated bankers?"

This entire illustration is based upon a begging of the very question in issue in this case. It assumes that the Ohio plan of taxation for unincorporated State banks is exactly the same as the plan for incorporated State banks, and further assumes that that plan is the taxation of the property belonging to the banking institution, in the name of the banking institution. The truth is, that the plan of taxation for unincorporated and incorporated banks, is not the same. The real situation is this. If an unincorporated bank is the *owner* of non-taxable United States bonds, it is required to pay no tax on those bonds under the Ohio statutes. The very same thing is true if an incorporated bank *owns* the same class of bonds. Indeed, an incorporated bank not only does not pay any tax upon non-taxable United States bonds, but it pays no tax upon any of its property, whatever, except its real estate. There is, therefore, certainly no discrimination against incorporated State banks in respect to taxation of non-taxable United States bonds. The discrimination, if there be any, is rather in favor of the incorporated State bank, because not only are its United States bonds exempt from taxation, in the name of the corporation, but all of its other property, except real estate. Neither is there a discrimination as against the stockholders in incorporated State banks, in respect to the matter of exempting non-taxable United States bonds. The uniform rule is that United States bonds are not taxed in the hands of any one whatever, or whomever. In the case at bar, the United States bonds are

not *owned* by the share-holders, but are owned by the incorporation. The shareholders, therefore, not being the owners of those bonds, are not entitled to any exemption from taxation on account of such bonds. Why should one man's property (shares of stock though it be) be exempt from taxation, because some relative of his (even though it be an incorporated bank) owns some non-taxable bonds? All *owners* of United States bonds are treated exactly alike. All share-holders, whether in banks or in other corporations, are treated exactly alike in this respect. If any *stockholders own* non-taxable United States bonds, they will be exempt from taxation, even though the shares of stock themselves may be, and are taxed. To allow stockholders in banks to deduct the value of the United States bonds held by the bank, and not do the same thing for shareholders in other corporations owning United States bonds, would, indeed, be to violate the rule of uniformity.

* * *

Plaintiff's counsel affirm the following proposition: "A tax upon the shares of stock of a corporation in the hands "of the owner, is a tax upon a kind of property separate and "distinct from the property of the corporation itself, and "such a tax is not equivalent to a tax upon the property of "the corporation."

We are disposed to admit the truth of that proposition. The value of the property belonging to the corpora-

tion is not, necessarily, and, indeed, not generally identical with the aggregate value of its shares of stock. The aggregate value of the shares of stock cannot well be less than the value of the property belonging to the corporation, but may be, and very often is, very much greater. The aggregate value of the shares of stock is equal to the value of all the taxable tangible and intangible property of the corporation plus the value of all the corporation's non-taxable property, plus the value of the franchise, plus the value of its good will, and plus the value of the ability, energy and integrity of the managers of the incorporation. And just because the aggregate value of the shares of stock in a corporation *necessarily includes* the value of its property, and usually exceeds that value, the State taxes the *shares*, and, in that way, complies with the constitutional rule, that all property engaged in the banking business shall be taxed as other property, whether that value is derived, merely, from the value of the corporation's property, or whether it is derived from that source and the other elements of value above enumerated, which enter into the aggregate value of the shares of stock of the banking corporation.

This method of taxation, to-wit: taxation of shares of stock in incorporated State banks, certainly fulfills, to the very extreme limit, the requirement of the constitution, so strenuously insisted upon by the plaintiff's counsel, that all property engaged in the banking business must be taxed as other property.

Counsel for plaintiff inquire: "How can it be successfully maintained that there is equality if an unincorporated banker is allowed to deduct holdings in government bonds from his total capital, while the incorporated bank is not permitted to make such deduction in determining the value of its property?"

This question assumes that Ohio statutes tax the property belonging to incorporated banks in the name of the bank. Upon such an assumption the question has pertinency; but that assumption begs the very question in controversy. That assumed proposition is the very one which defendant in error denies.

On page 37 of their printed brief, plaintiff's counsel say, "The national bank tax decisions do not govern or control the question at issue in this case." Those decisions, however, and the law of Congress on which they rest, make it impossible for Ohio to tax shares of stock in national banks, if Ohio taxes the taxable corporate property of her State banks, and thus go far to show that Ohio does not lay a tax on the corporate property of her State banks, but on the shares of stock in those banks, which is the question in issue in this case. Indeed, those decisions hold, in effect, that if Ohio does not tax the shares in its State banks, but does tax only the taxable property belonging to those banks, then, such taxation is a discrimination in favor of State banks and against national banks, which will prevent Ohio from

taxing shares of stock in national banks *at all.* If the contention of the plaintiff in error in this case prevails, then, Ohio must cease taxing shares of stock in national banks; but in so recent a case as

Chapman vs. The National Bank of Wellington, 56 O. S., 310,

as well as in

Niles vs. Shaw, 50 O. S., 370,

the Supreme Court of Ohio held that shares of stock in national banks may be taxed in Ohio; and the Supreme Court of the United States, in

National Bank of Wellington vs. Chapman, 173 U. S., 205,

ratified this holding. Those decisions, therefore, are conclusive to the effect that Ohio does tax shares of stock in her State banks, and not merely the taxable property owned by those banks.

On page 34 of their printed brief plaintiff's counsel say: "The property of an Ohio corporation being subject to "tax, the shares of stock in such corporation in the hands of "the owner are exempted from taxation."

This proposition directs attention to that portion of Section 2746, R. S., which reads: "but no person shall be re- "quired to list for taxation any share or shares of the capital "stock of any company, the capital stock of which is taxed in "the name of such company."

The proposition quoted from the brief of plaintiff's counsel, assumes that the plaintiff in error is a corporation, "the capital stock of which is taxed in the name of such com-"pany." This again begs the question in controversy, for the defendant in error denies that the plaintiff in error is a corporation, "the capital stock of which is taxed in the name "of such company." None of the company's property is taxed in its name, except its real estate.

On page 37 of their brief plaintiff's counsel say, "this plaintiff in error made a return of its taxable prop-"erty."

The petition itself does not allege that the plaintiff in error is charged with the tax on the tax duplicate. In fact, plaintiff bank is not charged on the duplicate for anything but its real estate. The stockholders, and not the bank, are charged with the tax upon the duplicate, and the petition so avers.

Incorporated banks have no right to make their returns as individuals make their returns. When there are special provisions of a statute relating to a given subject, then general provisions of the statute upon that subject do not apply. Sections 2672 to 2679, R. S. of Ohio, both inclusive, relating to the taxation of shares in incorporated banks, are such special provisions upon the subject of returns made by incorporated banks, and hence the general provisions as to

returns made by individuals, or by other corporations, do not apply.

It should be remembered that Exchange Bank of Columbus, vs. Hines, 3 O. S., 1, from which plaintiff's counsel quote so very extensively, was decided in 1853, when Ohio did tax State banks on the basis of the property owned by the bank, and did not tax shares of stock in those banks. This renders those quotations, to a large extent, inapplicable to the case at bar.

Respectfully submitted.

P. H. KAISER, County Solicitor,

O. L. NEFF, Assistant County Solicitor,

Attorneys for Defendant in Error.

CLEVELAND, OHIO, NOVEMBER 9, 1901.

W. W. Boynton.

Supreme Court of the United States.

No. 88.—October Term, 1901.

The Cleveland Trust Company, Plaintiff in Error, *vs.* M. A. Lander, Treasurer of Cuyahoga County, Ohio.	In error to the Supreme Court of the State of Ohio.

[February 24, 1902.]

This, a writ of error, to review the judgment of the Supreme Court of the State of Ohio, which sustained the ruling of the Court of Common Pleas of Cuyahoga County, dismissing upon the demurrer of the defendant in error the petition of the plaintiff in error praying for an order and decree restraining the collection of taxes levied upon the shares of the stockholders of plaintiff in error. (62 Ohio, 266.)

The plaintiff (plaintiff in error was plaintiff in the court below) is a banking corporation with a capital stock of $500,000, divided into 5,000 shares of $100 each, all of which are paid up, and for which certificates are outstanding and owned by a large number of persons, most of whom reside in Ohio.

The plaintiff made in due time return of its resources and liabilities, in accordance with section 2765 of the Revised Statutes of Ohio, to the auditor of the county, together with a full statement of the names and residences of the stockholders of the company, and with the number of shares held by each and the par value thereof, as required by the statute. The return included its real estate and one hundred and seventy-four bonds of the United States of the denomination of $1,000 each, "then and for a long time prior thereto owned by the plaintiff and in which the plaintiff had invested its capital stock." The plaintiff valued these bonds at the sum of $213,274.81, and in its return deducted that sum from the $500,000 par value of paid-in capital stock included among the liabilities of the plaintiff, leaving a balance of $286,725.19.

The county auditor refused to allow the deduction of the government bonds, and fixed the value of the shares of the capital stock at $338,700, exclusive of the assessed value of the real estate. No notice of this action was given plaintiff or its stockholders, nor did plaintiff or its stockholders know until the 11th of November, 1898, that said bonds had been included in fixing the valuation of the shares of the bank.

It is alleged in the petition that it is the custom of banks and banking institutions throughout the State of Ohio to deduct the value of government bonds from the paid-in capital stock returned, "although not so apparent upon the face of their returns to the several county auditors; that said bonds were by the banks and banking associations of this State so deducted in the return for 1897; that similar deductions of the United States government bonds are likewise made by unincorporated banks in the State of Ohio under and by virtue of the Revised Statutes of State of Ohio, sec. 2759; that the auditor of Cuyahoga County and the county auditors elsewhere throughout the State, as this plaintiff is informed and believes, did not include United States government bonds so owned in fixing the total value for 1898 of the shares of the several incorporated banks of Ohio, as directed by section 2766 of the Revised Statutes of Ohio."

The county auditor entered the valuation of the property of plaintiff, including said government bonds, upon the tax duplicate of the county, and assessed taxes against the same at the rate of .02955 cents on each dollar's valuation of the shares, making an excess of taxation of $4,283.71, and that that sum stands against said shareholders upon the tax duplicate in the hands of the defendant, "together with the remaining amount of taxes lawfully assessed against them upon the valuation so fixed by the county auditor."

The plaintiff tendered the sum which it regarded as legally due, and alleged the grounds upon which it claimed equitable relief.

The error in the judgment of the Supreme Court of the State is assigned as follows:

"First. The court erred in affirming the judgment of the circuit court in sustaining the judgment of the Court of Common Pleas on the demurrer of the defendant to the petition of the plaintiff.

"Second. The court erred in holding and deciding that the Cleveland Trust Company was not entitled, in making its statement to the auditor of Cuyahoga County, Ohio, under section 2765 of the Revised Statutes of Ohio, to deduct, for the purpose of taxation, from its capital and surplus, the amount of the United States government bonds owned by it under and by virtue of section 3701 of the Revised Statutes of the United States, as claimed in the original petition of the plaintiff."

Mr. Justice McKenna delivered the opinion of the Court.

The argument of the plaintiff in error claims a greater immunity from taxation for the shares of the Trust Company than section 5219 of the Revised Statutes of the United States gives to shares in national banks. That section permits the States to assess and tax the shares of shareholders in national banks, with the limitations only "that the taxation shall not be at any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;" and

that the shares of non-residents "shall be taxed in the city or town where the bank is located, and not elsewhere." The prayer of the petition is also opposed by decisions of this court. In *Van Allen* v. *The Assessors*, (3 Wall. 573,) the provision contained in section 5219—then a part of the act of Congress of June 3, 1864—came up for consideration. There was a dispute as to the meaning of the statute, and its validity was also assailed. The court asserted a distinction between the property of the bank and corporation as such, and the property of the shareholders as such, and held that the tax authorized by the statute was a tax on the shares, the property of the shareholder, not a tax on the capital of a bank, the property of the corporation. The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank. Of the provisions of the act expressing this purpose and the right of the State to tax the court said nothing "could be made plainer or more direct and comprehensive." The case was subsequently affirmed. (4 Wall. 244; 4 Wall. 259; 121 U. S. 138.)

The plaintiff concedes the distinction between the property of the corporation represented by its capital stock and the property of the shareholders represented by their shares, and bases an argument upon that distinction, and yet excludes from consideration, as immaterial to the questions at issue, the laws of Congress governing the taxation of the shares. The reasoning advanced is that under the laws and constitution of the State of Ohio the property of the trust company "must be and is subject to taxation;" and "that the sections of the statutes of the State of Ohio which provide the method for determining this tax value, so far as they apply to such trust company, simply prescribe a convenient method for arriving at the true value in money of the property of the corporation." And the deduction is made "that, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States government bonds then owned by it." In other words, the contention is that the tax on the shares being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the capital of the company invested in United States bonds.

The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (section 5219) by another (section 3701), between which there is no want of harmony. And what the constitution of the State of Ohio requires, or what the

statutes of the State require as to taxation, must be left to be decided by the Supreme Court of the State, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the constitution of the State as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the Federal tribunals. We do not mean to be understood as implying that the plaintiff's view of the constitution of the State, or of the laws of the State, is correct. The inquiry is not necessary. Accepting such view as correct, plaintiff shows no right, under the Constitution or laws of the United States, which has been violated.

Judgment affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the decision.

True copy.

Test :

Clerk Supreme Court, U. S.